ABE EICHNER

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Writing Sample

I wrote the following petitioner's brief for the quarterfinal round of Michigan Law School's 98th annual Henry M. Campbell Moot Court Competition. This brief reflects solely my own research, writing, and editing. I have omitted the discussion of the first question. The questions presented were:

(1) Did the Consumer Financial Protection Bureau adjudication and assessment of a civil penalty under the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536, implicate the Seventh Amendment right to a civil jury trial?

(2) Did the dual-layer removal scheme for administrative law judges and Merit Systems Protection Board members violate the separation of powers?

STATEMENT OF THE CASE

Introduction

Respondent Consumer Financial Protection Bureau ("CFPB") violated the constitution when it unilaterally determined that Sutherland Bank ("Sutherland") broke the law, assessed Sutherland millions in penalties, and then upheld its own determination. Sutherland was never allowed to present its case before a jury. This in-house process represents a dangerous encroachment by the administrative state onto two constitutional guarantees of liberty.

First, Sutherland was unconstitutionally denied a jury trial under the Seventh Amendment, because the fraud alleged by the CFPB is closely analogous to common law fraud. Second, the Administrative Law Judge ("ALJ") that found Sutherland liable was sheltered from presidential control by two layers of removal restrictions. Because CFPB ALJs have extensive authority, these restrictions unduly burden the President's ability to execute the law.

Statement of Facts

Sutherland Bank provides retail banking, stock brokerage, and wealth management services to more than 11 million customers nationwide. *H.B. Sutherland Bank, N.A. v. Consumer Fin. Prot. Bureau*, 505 F.4th 1, 2-3 (12th Cir. 2022). The CFPB enforces consumer protection statutes, including the CFPA. 12 U.S.C. § 5565. The CFPB opened administrative proceedings against Sutherland in 2019. 505 F.4th at 2. After an administrative trial, a CFPB ALJ issued a Recommended Order in 2020 finding that Sutherland engaged in deceptive acts and practices in violation of the Consumer Financial Protection Act ("CFPA"), which prohibits "any unfair, deceptive, or abusive act or practice".[1] *Id.* at 4; 12 U.S.C. §5536(a)(1)(B). The Recommended

[1] The CFPB also found that Sutherland violated the Electronic Fund Transfer Act and Fair Credit Reporting Act. 505 F.4th at 4. Sutherland waived its appeal to those claims on the Seventh Amendment issue. *Id.*

Order assessed economic damages totaling $8,139,894.58 and civil penalties of $4,155,500 and enjoined Sutherland from operating its Accounts Protection Program. 505 F.4th at 5. Thandiwe Pierson, Director of the CFPB ("the Director") then upheld the order. *Id.*

The ALJ who issued the recommended order is removable only "for good cause" by the Merit System Protection Board ("MSPB"). 5 U.S.C. § 7521. Members of the MSPB are themselves only removable by the President for "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

Procedural History

After the ALJ's Recommended Order in March, 2020, Sutherland appealed the Recommended Order to the Director. 505 F.4th at 5. The Director upheld the Recommended Order with a Final Decision in October, 2020. *Id*. Sutherland appealed to a Twelfth Circuit panel, who found in favor of the CFPB on both constitutional issues. *Id.* at 5–6. Sutherland then appealed to the Twelfth Circuit for rehearing en banc, which it granted. *Id.* at 6. In 2022, the Twelfth Circuit sitting en banc found in favor of the CFPB. *Id.* Sutherland petitioned for a writ of certiorari to this Court, which was granted in 2022. Order Granting Writ of Cert.

DISCUSSION

I. CFPA DECEPTION CLAIMS FOR CIVIL PENALTIES REQUIRE A JURY TRIAL

[Omitted]

II. TWO LAYERS OF REMOVAL RESTRICTIONS PROTECTING CFPB ADMINISTRATIVE LAW JUDGES VIOLATE THE SEPARATION OF POWERS

This Court should hold that such a powerful official as a CFPB ALJ cannot be insulated from democratic accountability by two layers of removal protections. "CFPB brings the coercive

power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties *through administrative adjudications* and civil actions." *Seila*, 140 S. Ct. at 2200 (emphasis added). This Court should therefore strip one layer of removal restrictions to reestablish the President's ability to "take Care that the laws be faithfully executed…." U.S. Const. art. II, § 3.

The President cannot execute the laws alone, and the Framers expected that the President would require the assistance of subordinate officers. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020). Implicit within the Take Care Clause is therefore the President's power to control, and consequently remove, most subordinate officers.[2] *Seila*, 140 S. Ct. at 2191. Otherwise, "the buck would stop somewhere else." *Id.* Here, CFPB administrative law judges are removable only for cause, which must be determined by the MSPB. 5 U.S.C. § 7521. In turn, MSPB members may only be removed by the President for cause. 5 U.S.C. § 1202(d). Though this Court recently struck down dual for-cause removal limitations for some other officers, it has deferred determining whether dual limitations on CFPB ALJs are constitutional until now. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (1997).

Previously, this Court has recognized only two exceptions to the President's general removal power: multi-member bodies of experts balanced along partisan lines, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and inferior officers with no policymaking authority, *Morrison v. Olson*, 487 U.S. 654 (1988). In both cases, the President did not need removal authority over the officer in question to execute the laws. Neither exception applies here because CFPB ALJs are single individuals with extensive policymaking authority. Further, this

[2] This Court recently determined that ALJs are officers, and not mere employees. *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018).

Court should not craft a new exception, as dual for-cause restrictions for ALJs have no basis in history or constitutional structure.

A. Existing Exceptions to the President's Removal Power do not Apply to Dual For-Cause Removal Restrictions on CFPB ALJs

"As [the President's] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." *Myers v. United States*, 272 U.S. 52, 117 (1926); *see Seila*, 140 S. Ct. at 2203, 2206 (holding presidential removal power "is the rule, not the exception," because the President is "the most democratic and politically accountable official in government.") Since this Court set out that general rule in *Myers*, it has permitted only two exceptions. 272 U.S. 52l; *Seila*, 140 S. Ct. at 2193 (reaffirming that this Court has only approved two exceptions to the general removal power). However, neither the holdings nor the spirit of these exceptions applies to the instant case.

First, in *Humphrey's Executor*, this Court upheld one layer of for-cause removal restrictions on the Federal Trade Commission. 295 U.S. 602. The Commission consists of five members, balanced along partisan lines, and appointed to staggered terms. *Id.* at 620. This institutional structure was designed so that "ambition [will] counteract ambition," and thus direct Presidential oversight was less necessary. *Seila*, 140 S.Ct. at 2202 (quoting The Federalist No. 51 (J. Madison)). Further, the President could typically appoint a majority of commissioners within a four-year term simply by waiting for their terms to expire.

This exception does not apply to for-cause removal restrictions for CFPB ALJs. Unlike Federal Trade Commissioners, CFPB ALJs are single officers appointed to theoretically unlimited terms, and are not balanced along partisan lines. 5 U.S.C. § 7521(a). In practice, this means that a President might be stuck with an ALJ from the opposing party who may strain against the President's policy agenda. The President is powerless to remove the ALJ unless the MSPB

determines there is cause to do so. *Id.* And unlike within the Federal Trade Commission, ALJs cannot restrain the actions of each other.

Second, in *Morrison* this Court upheld for-cause removal restrictions on an independent counsel with the ability to investigate other executive branch officials. 487 U.S. 654. The independent counsel performed "only certain, limited duties." *Id.* at 671. She did not have "any authority to formulate policy," her appointment was temporary, and her jurisdiction was limited to that granted by a court pursuant to a request by the Attorney General. *Id.* at 671-72. Further, as in *Humphrey's Executor*, the independent counsel enjoyed only one layer of for-cause restrictions. 295 U.S. 602; 487 U.S. 654. She was removable for-cause by the Attorney General, who was in turn removable at-will by the President. 487 U.S. at 696. This removal authority remains the "most important[]" means of supervision, and "provides the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel." *Id.*

The holding in *Morrison* also has no bearing here. CFPB ALJs hardly have limited duties. They can issue subpoenas and protective orders, take depositions, receive evidence, rule upon motions, issue sanctions, and issue recommended decisions. 12 C.F.R. § 1081.104(a)-(b). In essence, they serve as both judge and jury in an administrative trial, but unlike judges they are not bound by administrative precedent. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947). Indeed, this Court has affirmed ALJs' ability to make prospective policy through adjudications. *Id.* Further, in contrast to the independent counsel in *Morrison*, CFPB ALJs are not limited to internal investigations on other executive officials, and (as in Sutherland's case) they adjudicate hearings involving the public. 487 U.S. 654; 505 F.4th 1.

And critically, unlike the Attorney General in Morrison, the Director of the CFPB has no for-cause removal authority over an ALJ.[3] 5 U.S.C. § 7521. This destroys the "most important" means of supervision over the ALJ. 487 U.S. at 696. Although the Director can set aside the ALJ's recommended orders, 12 U.S.C. § 5563(b)(3), this would be an overly blunt tool to ensure ALJ compliance with Presidential policy. ALJs likely make dozens of procedural decisions leading up to each recommended order, but the Director cannot go back and admit different evidence, rule differently upon motions, or issue different subpoenas. Indeed, this Court has recently reemphasized the unique importance of the ability to remove. *Free Ent. Fund*, 561 U.S. at 504 ("Broad power over... functions is not equivalent to the power to remove."). Removal authority, even with one layer of for-cause removal limitation, can uniquely establish control via the threat of termination. *Id.* at 502.

B. This Court Should Not Craft a New Exception

This Court does not allow a new exception to the President's general removal power when the proposed exception has "no basis in history and no place in our constitutional structure." *Seila*, 140 S. Ct. at 2201. This statutory scheme has a basis in neither, so this Court should reject an attempt to craft a new exception.

Two layers of removal restrictions for executive officials is a recent innovation and therefore has no basis in history. "Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it." *Id.* (quoting *Free Ent. Fund*, 561 U.S. at 505) (cleaned up). In *Free Enterprise Fund*, this Court made clear that there is no precedential support for two layers of for-cause removal limitations. 561 U.S. at 486. Further,

[3] This Court determined in *Seila* that the CFPB Director must be removable at-will by the President. 140 S. Ct. 2183.

the recency of ALJ's dual-layer removal restrictions impedes an argument that the practice is historically rooted. The position of ALJ was created with the Administrative Procedure Act in 1946, but at that point the heads of each agency could directly remove an ALJ for cause. *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 132 (1953). That only changed in 1978 when Congress granted the MSPB the power to determine if there was cause to remove an ALJ.[4] Pub. L. No. 95-454 § 7521 (1978).

Next, dual for-cause removal limitations for CFPB ALJs have no place in our constitutional structure. Because the President (along with their Vice President) is the only person elected by the entire nation, the Framers intended that "a single President [be] responsible for the actions of the Executive Branch." *Clinton v. Jones*, 520 U.S. 681, 712–713 (1997) (Breyer, J., concurring in judgment). Removal limitations therefore interfere with this scheme when they *functionally* inhibit the President from executing the laws. *Morrison*, 487 U.S. at 685. The constitutionality of for-cause restrictions no longer "turn[s] on whether or not that official is classified as 'purely executive.'" *Id.* at 657; *Seila*, 140 S. Ct. at 2199 (noting that the Court has turned from a categorical approach towards a functional analysis). It is therefore not sufficient to ask whether an ALJ performs adjudicative functions, but instead whether restrictions on removing an ALJ interfere with the President's ability to execute the laws.

In *Free Enterprise Fund*, this Court struck down another dual-layer for-cause removal limitation scheme on functional grounds. 561 U.S. at 484. There, the Public Company Accounting Oversight Board ("PCAOB") was removable only for-cause by the Securities and Exchange Commission, which was in turn removable only for-cause by the President. *Id.* The PCAOB

[4] This Court has also rejected the notion that there was historical precedent to support a different statutory scheme created in 1978, "nearly 200 years after the Constitution was ratified". *Seila*, 140 S. Ct. at 2201.

performs adjudications, issues rules, and initiates investigations of accounting firms. *Id.* at 485. While the Court acknowledged it had upheld one layer of for-cause removal limitations in the past, "the added layer of tenure protection makes a difference," because the Securities and Exchange Commission was "not responsible for [PCAOB's] actions." *Id.* at 495-96. Neither the President nor any officer directly responsible to him had full control over the PCAOB. *Id.* at 496. These restrictions impeded the President's ability to execute the laws because the PCAOB "exercises significant authority pursuant to the laws of the United States." *Id.* at 486 (citing *Buckley v. Valeo,* 424 U.S. 1, 125–126 (1976)) (cleaned up).

The instant case presents an analogous situation. If the President or the Director wants to remove a CFPB ALJ, they not only need to find cause, but convince the MSPB that such cause exists. The MSPB cannot be held responsible for failure to do so, unless it commits malfeasance itself. The President would likely be reduced to persuading the ALJ or the MSPB to see matters from the President's perspective. This is why the *Free Enterprise Fund* court worried that two layers of for-cause removal limitations could reduce the President to "cajoler-in-chief." 561 U.S. at 502.

While this Court should strike down dual for-cause removal limitations for CFPB ALJs, its holding does not necessarily need to extend to all ALJs. CFPB ALJs may have substantially more policymaking authority than ALJs in some other agencies, so two layers of removal limitations for CFPB ALJs may present a correspondingly larger obstacle to the President's ability to execute the laws. To take one example, an ALJ in the Social Security Administration might make findings limited in policy scope and dollar amounts, while CFPB ALJs rule on matters of public importance and monetary significance. *Compare Jones v. Kijakazi*, No. CV 20-1074-SRF, 2022 WL 1016610 (D. Del. Apr. 5, 2022) (reviewing Social Security Administration ALJ ruling that single individual

not entitled to benefits); *with* PHH Corp., 2014 C.F.P.B. 2, 91 (Nov. 25, 2014), https://files.consumerfinance.gov/f/documents/201411_cfpb_recommend-decision-final_205.pdf (CFPB ALJ assessing $6 million penalty for mortgage company that issued "thousands" of "captive loans,"); *see also* Seila at 2202 ("unlike the CFPB, the [Social Security Agency] lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.").

CONCLUSION

For these reasons, Sutherland respectfully requests that this Court reverse the decision of the Twelfth Circuit on both issues presented. This Court should hold that deception actions for civil penalties under the CFPA require a jury trial, and that two layers of for-cause removal limitations for CFPB ALJs violate the separation of powers.

Applicant Details

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Applicant Education

BA/BS From	**Georgia State University**
Date of BA/BS	**May 2024**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Georgetown Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Georgetown Barristers' Council - Trial Advocacy Division**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

GARETT ELDRED

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June 11, 2023

Dear Judge Jamar K. Walker,

I am a Haitian American and a rising 3L Opportunity Scholar at Georgetown University Law Center, and I am writing to apply for a Judicial Clerkship in your chambers. I seek the role not only because it will be beneficial for my writing skills and career but also because it will give me the chance to earn a lifelong mentor. I am confident that I would be successful in your chambers due to my passion for the work, my dedication to excellence, and our shared set of interests and values. I strongly admire your passion for service, which is evidenced by your time as a federal prosecutor and your volunteer experiences with Virginia21, Kamp Kappa Street Law Program, and the DC Gay Flag Football League. These distinctions, amongst others, are why I enthusiastically wish to clerk for you. I humbly believe that my experiences, skillset, and character make me an excellent candidate for this role.

Prior to pursuing a future in law, I established my work ethic and learned the value of teamwork as a Division I student-athlete. I would then earn employment as a filing clerk at Nall & Miller, LLP, where I began developing my writing skills through drafting and filing legal documents. The summer before entering law school, I further developed these skills at Greathouse Trial Law, LLC, by gathering precedent relevant to our cases and drafting legal documents.

Since entering law school, I have had several experiences that have equipped me with the requisite knowledge and skills to positively contribute to your chambers. I have gained an understanding of courtroom procedures by serving as a Judicial Extern in the Court of Federal Claims, Office of Special Masters, and through my membership on Georgetown's Trial Advocacy Team, which led me to win Georgetown's annual 100+ participant Greenhalgh Trial Advocacy Competition, amongst other awards. I was also able to garner practical experience as a Summer Associate at two law firms last summer and by working in-house at AT&T as well. Last fall, I further enhanced my research and writing skills by working as a Research Assistant to tenured Professor Madhavi Sunder.

Currently, I am honing my skills as the Senior Development Editor of *The Georgetown Law Journal* and by working as a Summer Associate at two firms again this summer. This fall, I will again serve as an extern in the public sector and as a Research Assistant to Professor Shon Hopwood. I will conclude my law school experience by completing hundreds of pro bono hours as a Student Attorney in Georgetown's Civil Rights Clinic to better serve those in need and further enhance my skills.

Most importantly, I would like to clerk for you because I believe that our similarities are indicative of shared interests and values. As a member of several civic organizations like yourself, I can better appreciate your passion for service and dedication to the principles that make lawyers stand out as pillars in our communities. Before entering law school, I upheld this commitment by establishing the "It Could Be You Initiative", an initiative created to serve the homeless population in Atlanta, GA, and by serving as the Community Service Chair for the Zeta Mu chapter of Alpha Phi Alpha Fraternity, Inc. Since entering law school, I have further worked to uphold this commitment by serving as the Community Service Chair of Georgetown's Black Law Students Association and by participating in service efforts with Georgetown's Christian Legal Society. I believe shared interests and principles lead to stronger relationships, which is why I am confident that my time in your chambers would be rewarding, productive, and harmonious if given the opportunity.

I hope to work and learn under your tutelage, and I welcome any opportunity to discuss my qualifications in greater detail. I can be reached at (678) 644-6717 or by email at gne5@georgetown.edu. Thank you so much for your consideration.

Best,

Garett Eldred

Garett Eldred

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EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, D.C.**
Juris Doctor — May 2024
GPA: 3.42

Journal: *The Georgetown Law Journal*, Senior Development Editor Vol. 112

Honors:
Georgetown Greenhalgh Trial Advocacy Competition - First Place
Week One Teaching Fellow - Spring 2023
Greene Broillet & Wheeler National Civil Trial Competition - Honored Advocate
Opportunity Scholar
Kirkland & Ellis Afro Scholar
AT&T Scholar

Activities:
Barristers' Council - Trial Advocacy Division
Black Law Students Association
Christian Legal Society
RISE
Sigma Delta Tau Legal Fraternity, Inc.

GEORGIA STATE UNIVERSITY — **Atlanta, GA**
Bachelor of Science in Education — May 2021
Honors:
4X Dean's List
Division I Football Scholarship Recipient
Hope Scholarship Recipient
Mr. Unstoppable Winner

Activities:
Alpha Phi Alpha Fraternity, Inc.
Division I Student Athlete
NAACP at Georgia State University

EXPERIENCE

CIVIL RIGHTS CLINIC — **Washington, DC**
Student Attorney — January 2024 – May 2024
- Anticipating serving as the lead counsel on complex litigation matters in areas of voting rights, employment discrimination, housing discrimination, police brutality, conditions of carceral confinement, and equal protection in education, among others

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Research Assistant to Professor Shon Hopwood — September 2023 – December 2023
- Anticipating conducting research and delivering memorandums in areas of criminal and constitutional law

BALCH & BINGHAM LLP — **Atlanta, GA**
2L Summer Associate — July 2023 – August 2023
- Anticipating working on complex litigation matters in areas of financial service, healthcare, and energy

BAKER & HOSTETLER LLP — **Atlanta, GA**
2L Summer Associate — May 2023 – July 2023
- Created a slide deck presentation to propose improvements to a Major League Baseball team's Fan Guide and Giveaway Policy
- Drafted a memorandum evaluating the enforceability of a proposed resolution between a Section 8 property owner and a city
- Drafted a memorandum evaluating settlement amounts and reasons thereof for cases of inmate death due to deliberate indifference
- Drafted a memorandum evaluating the Plaintiff burden of proof in data breach cases across all twelve federal circuits
- Drafted a memorandum evaluating the enforceability of a liquidated damages provision in a service agreement between a major hospital and insurance provider
- Anticipating working on more complex litigation matters in areas of healthcare and labor and employment

U.S. COURT OF FEDERAL CLAIMS, OFFICE OF SPECIAL MASTERS — **Washington, DC**
Judicial Intern to Special Master Mindy Michaaels Roth — September 2022 – November 2022
- Drafted opinions related to Motions for Attorney's Fees and Costs based on the "reasonable basis for bringing the case" standard
- Drafted memorandums evaluating how cases should be decided in accordance with the standard of the Vaccine program
- Drafted questions to be asked by Special Master Roth to Expert Witnesses during hearings
- Attended a judicial conference hosted by the Court to learn more about effective advocacy and statutory interpretation

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Research Assistant to Professor Madhavi Sunder September 2022 – December 2022

- Drafted a series of questions to be asked of Counsel for the Respondent in Georgetown's Moot of *Warhol v. Goldsmith*, a pending Supreme Court case pertaining to Copyright law
- Researched and found new Copyright issues to be discussed and debated amongst students in class
- Revised class powerpoints to be more electronically accessible and reflect recent development in Copyright law

BALCH & BINGHAM LLP **Atlanta, GA**
1L Summer Associate July 2022 – August 2022

- Drafted a memorandum evaluating the legality and constitutionality of a proposed statute's no class action clause and exclusive remedy provision
- Drafted a memorandum evaluating the elements and evidentiary burden of a claim for attorney's fees under OCGA § 13–6–11
- Drafted a memorandum evaluating the limits of an agreement's clause limiting damages to only those which are direct, and not consequential, under New Jersey law
- Assisted in the preparation of a pro-bono hearing regarding a temporary restraining order in Cobb County Magistrate Court.
- Drafted a memorandum evaluating the effects of an intervening clause within a consent order, and a revised intervening clause to clarify the agreement under Georgia law
- Drafted a memorandum evaluating how three Georgia statutes interplay with each other to determine the necessities to authenticate medical records and satisfy the "business records exception"
- Drafted a memorandum evaluating the elements and defenses of an inverse condemnation claim under Georgia law
- Drafted a memorandum evaluating the elements and defenses of a spoliation claim under Georgia law
- Drafted a memorandum evaluating the parameters of non-compete/non-solicit provisions within employment contracts, and a provision incorporating those parameters for an employment contract under Georgia law

AT&T **Atlanta, GA**
Summer Law Fellow July 2022

- Drafted a memorandum to resolve an anti-compete matter brought before the Public Utilities Commission of California
- Prepared for depositions of opposing witnesses and client witnesses to resolve labor and employment disputes
- Contributed viable arguments in strategic planning meetings, based on legal research, to resolve labor and employment disputes

KILPATRICK TOWNSEND & STOCKTON LLP **Atlanta, GA**
1L Summer Associate May 2022 – July 2022

- Drafted a memorandum evaluating the reach of a settlement agreement's "in connection with" clause despite a merger clause within the agreement, under Georgia law
- Drafted a memorandum evaluating the enforceability of a joint defense agreement under Tennessee law
- Created a slide deck used for arbitrating a trademark dispute for a Fortune 500 telecommunications holding company
- Drafted notices of opposition and closing letters for trademark disputes for a Fortune 500 sportswear manufacturer and Fortune 500 airline company
- Drafted portions of an agreement to eliminate cellular data within prisons to improve safety measures for a Fortune 500 telecommunications holding company
- Created a case calendar following FRCP and Local Rules for an employment discrimination case between a Fortune 500 telecommunications holding company and one of their former executives
- Volunteered for the firm's Law Camp for the Boys & Girls Club of Metro Atlanta by conducting a presentation on professional attire and coaching the winning team during the camp's Mock Trial Competition

GREATHOUSE TRIAL LAW, LLC **Atlanta, GA**
Litigation Assistant/Summer Intern May 2021 – August 2021

- Filed and sorted through evidence for the firm's most consequential personal injury cases
- Corresponded with clients daily to update them on case proceedings and to request documentation as needed
- Drafted dismissals and other necessary documentation to complete closing procedures
- Assisted in depositions and meetings with opposing counsel to offer support and learn more about the litigation process

NALL & MILLER, LLP **Atlanta, GA**
Filing Clerk December 2020 – April 2021

- Filed documents and corresponded with clients to manage a caseload of thirty matters relating to transportation law
- Drafted Request for Documents Forms to advance the process of discovery
- Independently oversaw the distribution of all mail for the firm's attorneys and staff
- Led in the reorganization of the office's layout and the transition from physical to digital case filing

VOLUNTEER EXPERIENCE

- Alpha Phi Alpha Fraternity, Inc. – Community Service Chairman, Dean of Membership, and Chaplain
- Georgetown Black Law Students Association – Community Service Chairman
- It Could Be You Initiative – President and Founder (An Initiative Established to Serve Atlanta's Homeless Population)
- NAACP at Georgia State University – Health Committee Chairman

Record of: Garett N. Eldred
GUID: 835231260

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	94	Civil Procedure Aderson Francois	4.00	B	12.00	
LAWJ	002	41	Contracts Gregory Klass	4.00	B	12.00	
LAWJ	004	42	Constitutional Law I: The Federal System Irving Gornstein	3.00	B	9.00	
LAWJ	005	43	Legal Practice: Writing and Analysis Erin Carroll	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	33.00	3.00
Cumulative	11.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	94	Criminal Justice Christy Lopez	4.00	B	12.00	
LAWJ	005	43	Legal Practice: Writing and Analysis Erin Carroll	4.00	B+	13.32	
LAWJ	007	94	Property Madhavi Sunder	4.00	B+	13.32	
LAWJ	008	42	Torts Brishen Rogers	4.00	B+	13.32	
LAWJ	304	50	Legislation Caroline Fredrickson	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	19.00	19.00	61.95	3.26
Annual	30.00	30.00	94.95	3.17
Cumulative	30.00	30.00	94.95	3.17

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	110	08	Copyright Law Madhavi Sunder	3.00	A-	11.01	
LAWJ	126	05	Criminal Law Paul Butler	3.00	B+	9.99	
LAWJ	1491	131	~Seminar Deborah Carroll	1.00	A-	3.67	
LAWJ	1491	132	~Fieldwork 2cr Deborah Carroll	2.00	P	0.00	
LAWJ	1491	47	Externship I Seminar (J.D. Externship Program) Deborah Carroll		NG		
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A	12.00	
LAWJ	360	05	Legal Research Skills for Practice Rachel Jorgensen	1.00	A	4.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	13.00	11.00	40.67	3.70
Cumulative	43.00	41.00	135.62	3.31

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1196	08	Religion, Morality and Contested Claims for Justice Seminar	2.00	A-	7.34	
LAWJ	1265	05	Advanced Constitutional Law Seminar: The Creation of the Constitution	3.00	B+	9.99	
LAWJ	1335	05	Race, Inequality, and Justice	2.00	A-	7.34	
LAWJ	165	09	Evidence	4.00	A-	14.68	
LAWJ	1650	05	Income and Public Benefits	3.00	A	12.00	
LAWJ	351	02	Trial Practice	2.00	A	8.00	
LAWJ	610	05	Week One Teaching Fellows (Public Speaking For Lawyers)	1.00	P	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	17.00	16.00	59.35	3.71
Annual	30.00	27.00	100.02	3.70
Cumulative	60.00	57.00	194.97	3.42

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Garett Eldred for a clerkship. Garett was a student in my Criminal Law class. He was an active participant in class discussion and stopped by frequently during office hours. I serve as a faculty advisor to the Georgetown Black Law Student Association, and I have also gotten to know Garett through his leadership roles in that organization, including his work as chairperson for community service. Based on these experiences I recommend him with great enthusiasm.

Garett is an extremely bright, ambitious, and disciplined student with a great work ethic. He distinguished himself in my course with his insightful legal analysis and strong communications skills. I think these qualities would serve him well in a clerkship. They are evidence of the high expectations Garett sets for himself, and his ability to deliver. As a member of the prestigious Georgetown Law Journal, which is the flagship legal journal at our school, Garett has had an excellent opportunity to advance his research and writing skills. I am impressed, but not surprised, that Garett has performed exceptionally in trial advocacy competitions, including finishing in first place in the Georgetown Greenhalgh Trial Advocacy Competition.

I should also note that Garett is an exceptionally kind and mature law student. He is warm, respectful, has a fine sense of humor and a great personality. He would be the kind of law clerk that everyone in the courthouse likes, respects, and admires. He is very excited about the potential of a clerkship and I have no doubt that you would find him to be an asset to your chambers. I know that you have many highly qualified applications. I respectfully urge your consideration of Garett. I think you would be extremely satisfied with his work and his character.

Respectfully,

Paul D. Butler
The Albert Brick Professor in Law

Paul Butler - paul.butler@law.georgetown.edu

FROM THE CHAMBERS OF SPECIAL MASTER MINDY MICHAELS ROTH
UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
717 MADISON PLACE
WASHINGTON, DC 20439

June 13, 2023

To Whom It May Concern:

I am pleased to provide a recommendation for Garett Eldred. I am a Special Master at the United States Court of Federal Claims, the court with exclusive jurisdiction over claims related to vaccine injuries. Garett was an intern in my chambers during the fall semester of his 2L year of law school in 2022. I was quickly impressed by Garett's ability to readily grasp new concepts. He was also a delight to have in Chambers.

Garett attended status conferences, a hearing, drafted memorandum and assisted with the drafting of decisions on Motions. Additionally, I assign each of my interns the task of drafting a memorandum on a challenging legal/medical issue. These assignments demand a thorough review of medical records and the study of medical conditions. This adds an element of complexity to the legal writing process with which most law students are unfamiliar. Additionally, these assignments call for more foundational legal writing exercises, such as the summarization of facts and procedural history. Finally, and most importantly, impeccable legal analysis is vital in all decisions, as Vaccine Program cases are appealable to the Unites States Court of Federal Claims. Garett was assigned the task of drafting a decision in a case in which a complicated medical issue was involved. Garett's work was on par with what I expect of my new law clerk hires. Garett showed growth in his writing abilities over the semester due to his genuine desire to learn and improve.

Garett is intelligent, diligent, mature, and professional, as was demonstrated through his demeanor and work product. Working with Garett was a genuine pleasure. I am confident that he would be as welcome an addition to your chambers as he was to my chambers. In the event you may wish to discuss Garett's qualifications further, I can be reached at (202) 403-9006.

Sincerely,

Mindy Michaels Roth
Mindy Michaels Roth
Special Master

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter with enthusiastic support for Garett Eldred, who is applying for a clerkship in your chambers. I write to share my experiences as his professor, and why he has demonstrated that he would be a great fit for a clerkship.

Garett is a Haitian America, first-generation law school student with many admirable qualities. I first noticed those qualities when he attended my Prison Law and Policy class this past semester, where we cover issues facing incarcerated people, caselaw on their rights, and how, as a policy matter, we can fix the American criminal justice system. Garett's comments were always illuminating and showed a genuine hunger for community service, a humbleness to understand the issues, along with grit and wisdom.

Garett's childhood in Atlanta would lead him to both good and bad parts of town, where he developed a keen understanding of how to connect with people regardless of their background or differences. I believe this characteristic is indicative of why he would make a great clerk. Through my conversations with Garett and his participation in my course, I have found him to be both of strong conviction, but also with the discernment to know how to disagree without being disagreeable. Garett's also possesses a consistent professionalism that would make him an ideal clerk, and that is why I am proud to offer this letter on his behalf.

Garett deeply desires to make change in the world. During his days in undergraduate school, Garett created the "It Could Be You Initiative," a program designed to help the homeless population in and around Georgia State University. He has continued that service at Georgetown Law through his service in the Black Students Association, the RISE program, and Christian Legal Society.

Garett also has the legal chops to be worthy of a clerkship. He won the trial advocacy competition; he is an editor on the Georgetown Law Journal; and he scored an A in my class, one of the best grades on my admittedly difficult exam that tests both the application of legal principles and policy issues. He has also received several awards. His GPA has consistently gone upward since his first semester (a trait I see with many first-generation law school students), which provides a positive trend for his clerkship prospects. And he has secured a summer associate position at Baker & Hostetler in Atlanta, where he plans to practice.

But what makes Garett special is his personality. He is a thoughtful and engaging person. The kind of person who is equally adept at discussing criminal justice policy, the rules of statutory interpretation, or college football. He was a joy as a student, and I have no doubt he will make an excellent clerk. And he desires a clerkship for the right reason, as he wants the experience to become a better lawyer and to serve the public.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

Shon Hopwood
Associate Professor of Law

Shon Hopwood - srh90@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my sincere pleasure to provide my highest and most enthusiastic recommendation for Mr. Garett Eldred to be a judicial law clerk in your chambers. Mr. Eldred is one of our shining stars at Georgetown Law. An Opportunity Scholar, he is an award-winning student advocate and an editor of the prestigious *Georgetown Law Journal*. He is a student who has successfully balanced a broad array of extracurricular activities with academic excellence and an ongoing commitment to serving the public interest. He would make an excellent law clerk in your chambers.

I have known Mr. Eldred for almost two years. He has been a model student in both my 1L Property course (Spring 2022) and my upper level Copyright Law course (Fall 2022). Additionally, Mr. Eldred served as my Research Assistant during the Fall 2022 semester, during which time I observed him seamlessly juggle his coursework, research, and extensive extracurricular activities. As Mr. Eldred's professor, supervisor, and mentor, I have seen his passion for the law and his commitment to excellence firsthand. We have had numerous conversations discussing his legal aspirations. He always sat in the front row of my class and consistently offered contemporary applications of our coursework, some of which I incorporated into my PowerPoints to teach the rest of the class.

Mr. Eldred's academic achievement in law school has steadily improved each semester and I am confident that his legal analysis and writing skills are very strong. He received an A- in my copyright course this past semester, just missing the cutoff for an A by a few points. His final exam demonstrated mastery of the wide range of legal concepts covered in the class, and strong organizational, critical thinking, and writing skills.

Even more important is Mr. Eldred's work ethic, drive to learn and develop mastery, and commitment to obtain work and extracurricular experiences that will help him to continually build his research, writing, and advocacy skills. His achievements here are extraordinary. As an undergraduate he received the aptly named honorific of "Mr. Unstoppable"—indeed, Mr. Eldred has continued to be unstoppable at Georgetown Law! He won first place in the Georgetown Greenhalgh Trial Advocacy Competition and was named an Honored Advocate in the Greene Broillet & Wheeler National Civil Trial Competition. Mr. Eldred is the first Black man to win Georgetown's Greenhalgh Trial Advocacy Competition. (His co-counsel was the first Black woman to obtain the same feat.) Mr. Eldred aspires to be the first Black man to be editor-in-chief of the *Georgetown Law Journal*, and I am confident he can achieve this!

Mr. Eldred hopes to one day be a litigator and courtroom attorney. To this end, in addition to his demanding extracurricular activities, he has pursued a diverse set of work experiences that set him up to be an enormously successful judicial law clerk and attorney. Last summer, he worked in three settings, serving as a law fellow at AT&T, Balch & Bingham LLP, and Kilpatrick Townsend & Stockton LLP in Atlanta. (The three impressive offers demonstrate what an attractive and sought after candidate Mr. Eldred is!) Mr. Eldred wrote numerous memoranda and drafted a variety of legal documents in these roles. He further honed his legal research and writing skills with an externship in the court of Federal Claims, as an Editor of the *Georgetown Law Journal*, and as my research assistant. Mr. Eldred is conscientious and deliberate about seeking out opportunities – such as this clerkship – that will make him the very best advocate he can be.

As my research assistant, Mr. Eldred handled numerous assignments and impressed me with his thoroughness and attention to detail. On one assignment applicable to his work as a clerk, Mr. Eldred provided me with questions to ask during Georgetown's Law's moot of Warhol v. Goldsmith, a copyright case before the Supreme Court in which I was asked to serve on the panel questioning the attorney arguing the case before the Supreme Court. Mr. Eldred's questions were sharp and relevant, and were among questions we also debated in my Copyright class amongst the students as we discussed the viability of the arguments made in the case.

At the same time, Mr. Eldred has been and continues to be committed to public service work. While in college, he established the "It Could Be You Initiative," which sought to feed, clothe, and uplift the homeless population surrounding Georgia State University. At Georgetown Law, Mr. Eldred serves as the Community Service Chair of the Black Law Students Association and is an avid participant in the school's Christian Legal Society. These endeavors demonstrate Mr. Eldred's commitment to not only honing his skills as a writer and advocate, but also his commitment to being a grounded servant for humanity. I am confident that Mr. Eldred will continue to dedicate himself to pro bono work in the public interest to help others less fortunate to have the opportunities that were so critical for him.

That Mr. Eldred performed his work for me so well while being involved in numerous and significant extracurricular activities is notable. Mr. Eldred's discipline and time management skills, which he learned during his time as a Division 1 Student Athlete,

Madhavi Sunder - ms4402@georgetown.edu - (202) 662-4225

enable him to give serious attention to all of these organizations and activities without neglecting his coursework, which is truly admirable.

Mr. Eldred's impressive resume notwithstanding, my favorite thing about Mr. Eldred is his warm, charismatic, and kind personality. He is amicable and adaptable, able to get along with pretty much anyone. Mr. Eldred had a nomadic upbringing with multiracial parents. This allowed him to come in contact with people from all walks of life, and equipped him with a welcoming and inclusive spirit. As a clerk, Mr. Eldred will be working very closely with his judge and fellow clerks. I am confident that Mr. Eldred will be a joy and delight to work with.

I unreservedly give my very highest recommendation to Mr. Eldred. I am confident that he has the work ethic, skillset, personality, and intellectual acuity required to be a successful judicial clerk. Thank you for your consideration, and please feel free to contact me with further questions at ms4402@georgetown.edu.

Sincerely,

Madhavi Sunder
Frank Sherry Professor of Intellectual Property
Associate Dean for International and Graduate Programs

GARETT ELDRED

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WRITING SAMPLE

The following is a case comment I wrote in June 2022 for the Georgetown University Law Center Law Journal Write-On Competition. I was required to draw on a limited packet of sources to produce a comment no longer than 2,200 words, excluding footnotes. The comment was titled "Inaction Calls for Action: Why the Tenth Circuit's Determination that the Defendants in *Strain* were not Deliberately Indifferent was Incorrect." This case comment is my own independent work.

I. Introduction

"The Fourteenth Amendment prohibits deliberate indifference to a pretrial detainee's serious medical needs."[1] Circuit courts have disagreed on the proper standard for a pretrial detainee's deliberate indifference claim.[2] This disagreement stems from how the courts interpret the Supreme Court's holding in *Kingsley v. Hendrickson*.[3]

Kingsley set forth an objective standard for pretrial detainee excessive force claims which only require that an official *should have* known that his actions were unreasonable.[4] The Court chose an objective standard as opposed to the subjective standard used for convicted prisoners' excessive force claims which require a subjective display of malicious intent.[5] The Court reasoned that there is a greater need to protect pretrial detainees than convicted prisoners because pretrial detainees are presumed completely innocent.[6] Thus, the Court set forth a more lenient standard, easing the burden on pretrial detainees who seek redress for their suffered harm.[7]

The Second and Ninth Circuits have extended *Kingsley*'s objective standard to pretrial detainee deliberate indifference claims.[8] The Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have declined to extend *Kingsley*'s objective standard and instead set forth a more stringent subjective standard, requiring a plaintiff to show proof that a jail official was subjectively aware of a pretrial detainee's serious medical need.[9]

A. Background of Strain

The morning after Thomas Pratt (Mr. Pratt), a pretrial detainee, was booked into the Tulsa County Jail (the Jail), he complained of alcohol withdrawal and requested detox mediation.[10] A nurse conducted a drug and alcohol withdrawal assessment of Mr. Pratt that afternoon where he informed her that he had habitually drank fifteen-to-twenty beers per day for the past decade.[11]

Staff admitted Mr. Pratt to the Jail's medical unit, conducted a mental health assessment, documented his withdrawal symptoms, but never gave him the requested detox medication.[12]

Days later, a jail nurse conducted a withdrawal assessment, which revealed worsening symptoms.[13] The nurse finally gave Mr. Pratt Librium but it proved ineffective.[14] Despite the severity of Mr. Pratt's symptoms, and an assessment tool advising the nurse to contact a physician, the nurse failed to contact a physician.[15] The nurse also failed to check Mr. Pratt's vitals or perform any additional assessments.[16]

Approximately eight hours later, a jail doctor examined Mr. Pratt and noticed a two-centimeter cut on his forehead and a pool of blood in his cell.[17] The doctor, aware of Mr. Pratt's earlier symptoms from his medical records, observed Mr. Pratt's disoriented state, but only gave him Valium without sending him to the hospital for suitable care.[18] Another nurse encountered Mr. Pratt later that afternoon and noted that he needed assistance with daily living activities.[19] Yet again, the staff did not escalate Mr. Pratt's level or place of care.[20]

The next morning, a licensed professional counselor (LPC) conducted a mental health evaluation of Mr. Pratt.[21] The LPC observed Mr. Pratt struggling to answer questions and determined the cut on his forehead was unintentional.[22] Nevertheless, the LPC declined to seek further care for Mr. Pratt.[23]

That afternoon, the doctor assessed Mr. Pratt again and noted that he was underneath the sink in his cell with a cut on his forehead.[24] Another nurse observed Mr. Pratt around midnight, but he would not get up, so she did not check his vitals.[25] Just before 1 a.m., a detention officer found Mr. Pratt lying motionless on his bed and called for a nurse. Mr. Pratt had suffered a cardiac arrest and was then finally sent to the hospital.[26] The hospital later discharged Mr. Pratt with a seizure disorder and other ailments that left him permanently disabled.[27]

Mr. Pratt's guardian, Faye Strain (Ms. Strain) brought a § 1983 action against county officials, jail medical staff, and municipalities for their deliberate indifference to Mr. Pratt's serious medical needs.[28] Ms. Strain argued that deliberate indifference to a pretrial detainee's serious medical needs includes only an objective component and that there were sufficient facts to support her claim that the defendants were deliberately indifferent.[29] The defendants argued that deliberate indifference to a pretrial detainee's serious medical needs includes both an objective and a subjective component, and that Ms. Strain met neither component.[30] The District Court agreed with the defendants, granting their motions to dismiss.[31] Ms. Strain appealed to the Tenth Circuit.[32]

B. Holding

The Tenth Circuit affirmed the lower court's ruling.[33] Judge Carson, writing for the court, held that Ms. Strain failed to allege sufficient facts to support her deliberate indifference claims.[34] The court reasoned that *Kingsley v. Hendrickson* applied solely to excessive force claims, not on the status of the detainee, and thus should not be extended to deliberate indifference claims brought by pretrial detainees.[35] Next, they asserted that deliberate indifference infers a subjective component.[36] They concluded that the defendants were not deliberately indifferent and held that Ms. Strain's complaint failed to show that the defendants were subjectively aware of Mr. Pratt's serious medical needs and acted objectively unreasonable under the circumstances.[37] They further held that the municipality defendant could not be held liable because Ms. Strain did not allege a systematic failure of multiple officials equating to a constitutional violation.[38]

C. Roadmap

The Tenth Circuit incorrectly granted the defendants' motions to dismiss because Ms. Strain alleged sufficient facts to support her deliberate indifference claims. This comment argues that the Supreme Court's objective standard should be logically applied to pretrial detainee deliberate

indifference claims for two reasons. First, *Kingsley* uniquely applies to pretrial detainees. Second, the defendants were both objectively and subjectively aware of the substantial risk of harm regarding Mr. Pratt's serious medical needs. Next, this comment argues that the defendants' inaction was unreasonable under the circumstances and amounted to more than mere negligence. Finally, this comment argues that the facts alleged indicate a custom or policy of the municipality defendant sufficient to hold them liable for deliberate indifference to Mr. Pratt's serious medical needs.

II. Analysis

A. The Kingsley standard applies to pretrial detainee deliberate indifference claims.

A holding can be extended to an issue distinct from the one it addresses if doing so would be logical.[39] Broad wording indicates that a holding can be logically extended beyond the exact issue it addresses.[40]

The Tenth Circuit declines to extend the objective standard used for pretrial detainee excessive force claims in *Kingsley* to pretrial detainee deliberate indifference claims.[41] The court argues that it is inappropriate to consider the *Kingsley* decision dispositive because it specifically addressed pretrial detainee excessive force claims, which are not the issue precisely presented in the case.[42] By doing so, the court erroneously focuses solely on the differences between the issues in each case instead of their similarities. The court ignores the principle that a holding can be extended so long as doing so is logical.

The extension is logical because the broad wording of *Kingsley* indicates that it may be extended beyond what it addresses. The *Kingsley* rule rested on the detainee's status and not excessive force,[43] as the court suggests.[44] Evidence of this is the remaining subjective standard for convicted prisoners' excessive force claims.[45] Further, the term "pretrial detainee" is used

significantly more than "excessive force," in the opinion,[46] and when "excessive force" is used, it is almost exclusively in conjunction with "pretrial detainee."[47] Thus, the *Kingsley* objective standard should logically apply to pretrial detainee deliberate indifference claims.

B. The defendants were objectively and subjectively aware of Mr. Pratt's medical needs.

Following the *Kingsley* objective standard, a plaintiff need only show that a defendant-official knew, or should have known, that the pretrial detainee's medical condition posed a serious risk to health or safety.[48] A defendant *should know* something if it is their responsibility to address it.[49] The subjective standard requires the defendant to have (i) *actually known* that the plaintiff's medical condition posed a serious risk, or (ii) that the risk was obvious.[50]

Objectively, as his medical and mental caretakers, every defendant *should have* known of Mr. Pratt's serious medical needs because it was their responsibility to address them.[51] However, even under the more stringent subjective standard, the facts alleged indicate that the defendants *actually knew* of Mr. Pratt's serious medical needs, and that the needs were obvious. Mr. Pratt told the defendants about his habitual drinking from the time he entered the facility, and they witnessed his conditions worsen.[52] They were advised to seek additional help by a medical device and witnessed him curled up in a pool of blood with a cut on his head.[53] They witnessed him disoriented and struggling to answer questions.[54] They were even advised that he needed alternative living arrangements and saw him lying motionless in bed.[55] These facts indicate that the defendants were aware of the serious risk to Mr. Pratt's health; even if they were not, the risk was obvious.

C. A reasonable jail official, or medical staffer would have done substantially more to treat Mr. Pratt's serious medical needs.

If a defendant knows or should know that a plaintiff's medical condition poses a serious risk to health or safety, and they disregard it, they will be held liable for deliberate indifference.[56] The

plaintiff must prove more than negligence but substantially less than subjective intent.[57] A person need only "consciously disregard"[58] a substantial risk by acting intentionally (on their own accord) and not by accident.[59] Conduct that is more than mere negligence includes grossly inadequate care, administering easier but less effective treatment, administering treatment that is so cursory as to amount to no medical care at all, and delaying necessary medical treatment.[60]

Here, the facts do not indicate that the actions or inaction taken by the defendants were by accident.[61] Thus, a ruling in the light most favorable to the plaintiffs would result in a finding that the defendants acted intentionally (on their own accord).

The alleged conduct signifies a reckless disregard more than mere negligence because it is an easier but less effective treatment, and so cursory as to amount to no medical care at all. After witnessing all the facts alleged, the defendants are said to have done nothing more than assess Mr. Pratt's needs and give him sedatives.[62] The Tenth Circuit argues that Ms. Strain's complaint goes toward the efficacy of treatment and not whether treatment was administered at all.[63] The court's understanding is faulty because though treatment that proves ineffective is not grounds for a deliberate indifference claim, assessing one's needs and prescribing sedatives cannot be deemed to be treatment.

Assessing needs only helps recognize and track medical needs but does nothing to treat them. Sedatives simply put a blanket over the actual need by easing side effects without treating the issue causing the effects – like giving Ibuprofen to someone with a gunshot wound. It was a lot easier for jail officials to simply feed Mr. Pratt sedatives instead of actually treating his serious medical needs. Furthermore, by delaying treatment until Mr. Pratt went into cardiac arrest, the jail officials heightened the likelihood of his harm. A reasonable jail official or medical staffer would have done

substantially more to treat Mr. Pratt's serious medical needs, and therefore the defendants' alleged inaction amounted to deliberate indifference.

D. The facts alleged indicate the municipality defendant has a custom or policy of deliberate indifference toward pretrial detainees' serious medical needs.

A municipality defendant can be held liable when shown to have a custom or policy which leads to a plaintiff's injuries.[64] In such a case, "the combined actions of multiple officials can amount to a constitutional violation even if no one individual's actions were sufficient."[65] A municipality can demonstrate a custom or policy of providing delayed emergency medical treatment to inmates by just their actions or inactions as opposed to a written policy or rule.[66] "Systemic deficiencies"[67] and "repeated examples of delayed or denied medical care"[68] can provide the basis for a finding of deliberate indifference.

Here, the facts alleged demonstrate repeated examples of delayed or denied medical care by individuals within the municipality. On several occasions, the facts alleged reveal that employees of the municipality assessed Mr. Pratt's serious medical needs and failed to act, resulting in permanent disability.[69] The repetitiveness of the issue indicates a custom or policy of delayed or denied medical care. Thus, Ms. Strain stated a valid claim based on the facts alleged, and the district court erred in granting the municipality defendant's motion to dismiss.

E. Conclusion

The facts alleged indicate that Ms. Strain's deliberate indifference claims were sufficient to survive a motion to dismiss. First, *Kingsley* uniquely applied to pretrial detainees, and the Supreme Court's objective standard can be logically applied to pretrial detainee deliberate indifference claims. Secondly, the defendants were both objectively and subjectively aware of the substantial risk of harm regarding Mr. Pratt's serious medical needs. Third, the defendants' inaction was

unreasonable under the circumstances and amounted to more than mere negligence. Finally, the facts alleged indicate a custom or policy of the municipality defendant sufficient to hold them liable for deliberate indifference. Thus, the court erred in their judgement.

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[1] *Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020).

[2] Some Circuits believe that pretrial detainee deliberate indifference claims warrant an objective standard, while others believe the standard should be subjective. *See, e.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016). *But see, e.g.*, *Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415, 419 (5th Cir. 2017); *Whiting v. Marathon County Sheriff's Dept.*, 382 F.3d 700, 703 (7th Cir. 2004); *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 (8th Cir. 2018); *Strain*, 977 F.3d at 987; *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999).

[3] *See generally Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (initiating an objective standard for excessive force claims brought by pretrial detainees).

[4] *See id.* at 389–90.

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] The Second and Ninth Circuits have held that the *Kingsley* objective standard should be applied to pretrial detainee deliberate indifference claims. *See, e.g.*, *Darnell*, 849 F.3d at 29; *Castro*, 833 F.3d at 1069.

[9] The Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that the *Kingsley* objective standard does not apply to pretrial detainee deliberate indifference claims. *See, e.g.*, *Alderson*, 848 F.3d at 419; *Whiting*, 382 F.3d at 703; *Whitney*, 887 F.3d at 860; *Strain*, 977 F.3d at 987; *McElligott*, 182 F.3d at 1255.

[10] *See Strain*, 977 F.3d at 987.

[11] *See id.*

[12] *See id.*

[13] *See id.* at 988.

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.* at 989.

[30] *See id.*

[31] *See id.* at 988.

[32] *See id.*

[33] *See id.* at 987.

[34] *See id.* at 989.

[35] *See id.* at 991.

[36] *See id.*

[37] *See id.* at 995–96.

[38] *See id.* at 997.

[39] *See Gordon v. County of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018).

[40] *See Castro*, 833 F.3d at 1070.

[41] *See Strain*, 977 F.3d at 991.

[42] *See id.*

[43] *See generally Kingsley*, 576 U.S. 389 (initiating an objective standard solely for excessive force claims brought by pretrial detainees).

[44] *See generally Strain*, 977 F.3d 984 (holding *Kingsley* was unique to excessive force claims).

[45] *See Kingsley*, 576 U.S. at 400.

[46] *See generally Kingsley*, 576 U.S. 389.

[47] *See generally Kingsley*, 576 U.S. 389.

[48] *See Darnell*, 849 F.3d at 35.

[49] *See Miranda v. County of Lake*, 900 F.3d 335, 343 (7th Cir. 2018) (holding that jail officials should not have known about pretrial detainee's medical condition because it was primarily the responsibility of medical professionals whom they could reasonably rely upon).

[50] *See Castro*, 833 F.3d at 1068, 1072.

[51] *See Strain*, 977 F.3d at 987.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See Darnell*, 849 F.3d at 27, 29.

[57] *See Castro*, 833 F.3d at 1071.

[58] *Id*. at 1085.

[59] *See id.*

[60] *See Davies v. Israel*, 342 F.Supp.3d 1302, 1308 (S.D. Fla., 2018).

[61] *See Strain*, 977 F.3d at 987.

[62] *See id.*

[63] *See id.* at 995.

[64] *See Castro*, 833 F.3d at 1075.

[65] *Strain*, 977 F.3d at 997.

[66] *See Castro*, 833 F.3d at 1075.

[67] *Davies*, 342 F.Supp.3d at 1309.

[68] *Id.*

[69] *See Strain*, 977 F.3d at 987.

Applicant Details

First Name	**Rayne**
Middle Initial	**H**
Last Name	**Ellis**
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Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 18, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Legislation and Public Policy**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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erin.murphy@nyu.edu
(212) 998-6672
Rudensky, Yurij
rudenskyy@brennan.law.nyu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

RAYNE H. ELLIS
88 Lexington Avenue
NY, NY 10016
(478) 335-8718
rayne.ellis@law.nyu.edu

Honorable Jamar K. Walker
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers starting during the term of 2024, or any subsequent term. I graduated from New York University School of Law in May of 2022 and have joined Arnold & Porter as an associate on their litigation team with a focus on products liability. Additionally, I was born in Virginia, and I am particularly interested in returning to my home state to clerk.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample is a Note that I wrote for Professor Jeremy Waldron's Human Dignity course examining criminal justice reform through a dignitarian lens.

Arriving separately are three letters of recommendations from the following NYU Professors: Erin Murphy (erin.murphy@nyu.edu), for whom I worked as a teaching assistant; Jeremy Waldron (jeremy.waldron@nyu.edu), my Note supervisor; and my Brennan Center Clinic seminar professor Yurij Rudensky (rudenskyy@brennan.law.nyu.edu), in collaboration with my fieldwork supervisor Gowri Ramachandran (ramachandrang@brennan.law.nyu.edu).

If there is any other information that would be helpful to you, please let me know. I would welcome the opportunity to interview with you and look forward to hearing from you soon. Thank you for your consideration.

Respectfully,

Rayne H. Ellis

RAYNE H. ELLIS

88 Lexington Avenue, #504
New York, New York 10016
(478) 335-8718 • rayne.ellis@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
JD, May 2022
Honors: Dean's Scholar (*merit-based scholarship*)
Staff Editor, *Journal of Legislation and Public Policy*
Activities: Black Allied Law Student Association
Brennan Center Public Policy Advocacy Clinic (Fall 2020)
Criminal Law Teaching Assistant, Professor Erin Murphy (Fall 2020)
Regulatory Policy Clinic (Fall 2021)

NEW YORK UNIVERSITY, New York, New York
B.A. in Journalism and Psychology, May 2018
Honors: President's Honor Roll
Arthur Ashe, Jr. Award (x2)
UAA All-Academic Award (x3)
Activities: Varsity Volleyball Team, Four-Year Starting Middle and Captain
Student Athlete Advisory Committee, Co-President
Special Olympics Volleyball Coach

EXPERIENCE

ARNOLD & PORTER, New York, New York
Associate, Fall 2022; ***Summer Associate*****,** May 2021–July 2021
Drafted memoranda concerning Title IX notice and grievance procedures, the authority Members of Congress have over seating their own members, and CERCLA "owner" liability. Edited and added to an American Bar Association chapter on civil sanctions against domestic terrorists. Attended a deposition and organized key takeaways for attorneys.

RICHMAN LAW & POLICY, New York, New York
Summer Associate**,** June 2020–August 2020, January 2021—April 2021
Researched and drafted discovery motions, complaints, and legal memoranda regarding false statements made by companies about animal welfare, human rights, and environmental commitments. Led client meetings and worked closely with attorneys on settlement negotiations.

ARITZIA, New York, New York
Fitting Room Manager**,** November 2018—July 2019
Developed high-level clientele and generated sales as a styling go-to for this boutique retail store. Worked in tandem with the store manager to curate the shopping experience for clients. Engaged staff in styling, development, and training. Promoted to Fitting Room Manager after two months of styling experience.

MASHABLE, New York, New York
Science Editorial Fellow**,** May 2018—November 2018
Authored feature length articles on an array of topics including climate change, technology's impact on the environment, and on global warming's effects on humans, with a specific emphasis on mitigating future crises. Represented Mashable at important events, such as the Global Citizens Festival.

ADDITIONAL INFORMATION

Admitted to New York State Bar. Proficient in Spanish. Additional employment experience as an editorial fellow at Delish Magazine, and an editorial intern at Psychology Today, V Magazine, Complex Magazine, and Elite Daily. Conducted research for the Center on Race, Inequality, and the Law at NYU Law. Refurbished a library for a domestic violence survivors' shelter in Georgia. Enjoy historical dramas, long-distance running, and the ballet.

Name: Rayne H Ellis
Print Date: 06/01/2022
Student ID: N14534829
Institution ID: 002785
Page: 1 of 2

NEW YORK UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
School of Law
FICE School Code: 002785

Send To: RAYNE HAELI ELLIS

New York University
Beginning of School of Law Record

Degrees Awarded

Bachelor of Arts 05/16/2018
College of Arts and Science
Major: Journalism
Major: Psychology
Minor: Politics

Juris Doctor 05/18/2022
School of Law
Major: Law

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachel Wechsler			
Torts	LAW-LW 11275	4.0	B
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	B
Instructor: Samuel Issacharoff			
Contracts	LAW-LW 11672	4.0	B
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Refuge Beyond Reach			
Instructor: Ashley Binetti Armstrong			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachel Wechsler			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Adam M Samaha			
Criminal Law	LAW-LW 11147	4.0	CR
Instructor: Erin Murphy			
International Law	LAW-LW 11577	4.0	CR
Instructor: Jose E Alvarez			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Refuge Beyond Reach			
Instructor: Ashley Binetti Armstrong			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Brennan Center Public Policy Advocacy Clinic	LAW-LW 10328	3.0	A
Instructor: Yurij Rudensky			
Brennan Center Public Policy Advocacy Clinic Seminar	LAW-LW 10353	2.0	A
Instructor: Yurij Rudensky			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Nathan Maxwell Crystal			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Erin Murphy			
Immigration Law & Rights of Non Citizens	LAW-LW 11610	4.0	B
Instructor: Adam B Cox			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Evidence	LAW-LW 11607	4.0	CR
Instructor: Erin Murphy			
Constitutional Law	LAW-LW 11702	4.0	B
Instructor: David A J Richards			
Human Dignity Seminar	LAW-LW 11797	2.0	A
Instructor: Jeremy J Waldron			
Human Dignity Seminar Writing Credit	LAW-LW 11897	1.0	A
Instructor: Jeremy J Waldron			
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	A
Instructor: Preet Bharara			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Regulatory Policy Clinic Seminar	LAW-LW 10105	2.0	A
Instructor: Richard L Revesz			

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Elizabeth Kienle-Granzo
University Registrar
www.nyu.edu/registrar

ACADEMIC TRANSCRIPT

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Name: Rayne H Ellis
Print Date: 06/01/2022
Student ID: N14534829
Institution ID: 002785
Page: 2 of 2

NEW YORK UNIVERSITY
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School of Law
FICE School Code: 002785

Max R Sarinsky			
Journal of Legislation and Public Policy	LAW-LW 10621	1.0	CR
Regulatory Policy Clinic	LAW-LW 11029	3.0	A-
Instructor: Richard L Revesz Max R Sarinsky			
Property	LAW-LW 11783	4.0	B
Instructor: Daniel Hulsebosch			
Federal Indian Law	LAW-LW 12367	2.0	B
Instructor: Joel West Williams			
After the 2020 Election: the Paths and Challenges of Political Reform Seminar	LAW-LW 12398	2.0	A-
Instructor: Robert Bauer			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	70.0	70.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff Arthur R Miller			
Environmental Justice	LAW-LW 10424	2.0	A-
Instructor: Sara E. Imperiale Yukyan Lam			
Torts:Products Liability	LAW-LW 11140	3.0	B+
Instructor: Mark A Geistfeld			
Federal Courts and the Federal System	LAW-LW 11722	4.0	B+
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	83.0	83.0

Staff Editor - Journal of Legislation & Public Policy 2020-2021
Notes Editor - Journal of Legislation & Public Policy 2021-2022

End of School of Law Record

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ACADEMIC TRANSCRIPT

RAISED SEAL NOT REQUIRED
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Elizabeth Kienle-Granzo
University Registrar
www.nyu.edu/registrar

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 424
New York, New York 10012-1099
Telephone: (212) 998-6573
Facsimile: (212) 995-4526
Email: jeremy.waldron@nyu.edu

Jeremy Waldron
University Professor, NYU

February 7, 2023

Dear Judge

A student of mine at NYU, Ms. Rayne Ellis, is applying for a clerkship in your chambers. She has asked me to write in support of her application. I am very happy to do so.

I know Ms. Ellis as a student in my HUMAN DIGNITY seminar in Spring 2021. This was a demanding seminar, combining a lot of theoretical reading with case law from a number of foreign countries as well as the United States.

Ms. Ellis was a steady and thoughtful presence in the class, making fine contributions both in discussion and in the weekly memos she submitted. She was consistent in her ability to bring up original insights that were always on point for the topic we were addressing. Some of the students took the opportunity of their "Human Dignity" memos to engage in esoteric speculation about distant ethical matters. Ms. Ellis, by contrast, was always able to advance the core discussion with her thoughts, and bring us back to each topic's center of gravity. This made her an intellectual leader in the class, and it was much appreciated.

Ms. Ellis's final paper for the seminar was on the topic of the place of dignity in judicial reasoning about the criminal justice system. It was a theoretically informed but pragmatically structured discussion. I was particularly taken by Ms. Ellis's account of the small changes that might be

made to begin restoring the humanity of those who are caught in the crosshairs of the criminal justice system. In her plea for modest reforms, she wrote:

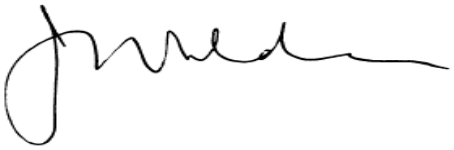
> Perfect recognition of human dignity is not defined, therefore perfection in reform is not attainable. Most can recognize certain behaviors as blatantly disrespectful to our shared humanity. We have an obligation to alleviate the suffering of those being violated. Modest reform efforts must demand our immediate attention.

Ms. Ellis received a grade of A for the seminar.

I have not had much to do with Ms. Ellis apart from our *Human Dignity* discussions. You will see from her resume that her grades have improved since her first semester-with six straight A's in 2020-21

I believe she will make a very fine clerk. She is passionate about issues of racial justice and, in my view, she has the ability and intellectual discipline to match that passion. She will grace any chambers lucky enough to secure her services. I am happy to pass on my very strong recommendation for this candidate.

Sincerely,



Jeremy Waldron
University Professor and Professor of Law, NYU

Erin E. Murphy
Norman Dorsen Professor of Civil Liberties
New York University School of Law
40 Washington Square South, Room 419
New York, NY 10012
(212) 998-6672
erin.murphy@nyu.edu

March 27, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with utmost enthusiasm that I write to give Rayne Ellis my enthusiastic recommendation for a clerkship in your chambers. I met Rayne in Spring of 2020 (when the world came to a stop), hired her to serve as a teaching assistant in Fall of 2020 (during what turned out to be the most challenging semester in my 15 years of teaching), and had the pleasure of teaching her again under more normal circumstances in Spring of 2021. In every circumstance, she shined.

Rayne was one of 90-plus 1Ls in my criminal law class in the Spring of 2020, which mid-semester turned into a criminal law Zoom. To say it was a challenging time is of course an understatement. We were in New York City, the epicenter of the first bout of what we now all know became the Covid-19 pandemic. Almost overnight, faculty, staff, and students were confronting rampant actual infections, and equally terrifying fear of infection. Our 1Ls were suddenly packing up to head home or endeavoring to set up remote learning. It was not an easy time to teach or to learn.

Throughout it all, Rayne showed tremendous grace under pressure. Already a strong student, Rayne continued to show up and to shine even as she moved back home and assumed new familial responsibilities. And although her transcript reflects the mandatory credit/fail policy we adopted that semester, in recognition of the variable and extreme challenges faced by our students, I graded the exams blindly in my usual custom. I was not surprised to see Rayne's exam among the top scorers. It was her performance in class, both academically and as a participant in our many class discussions, that led me to ask her to TA my course the following year.

Of course, little did I know at that time how challenging and difficult the following year would be. I taught Criminal Law in the Fall of 2020 in a hybrid format – teaching to a third of the class in person (with masks, socially-distant etc.) with the remainder on Zoom. Suffice it to say that 1L year is not meant to be a virtual experience, and Zoom only exacerbated the challenges of teaching Criminal Law the first semester after the murder of George Floyd and the racial reckoning that followed. I never dreamed that I would have to ask so much of my TAs, but I did. I will spare the gory details, but Rayne and her fellow TAs ended up putting in an extraordinary amount of time – easily four times the usual amount required for TAs, in a semester in which no one had a moment to spare – in order to support, guide, and instruct the students. Rayne, along with the two other TAs, devised and ran both academic and social support programs on Zoom, hosted extra office hours and review sessions, and offered a range of group and individualized support. They also perservered in the face the fury of frustrated and anxious 1Ls, who were isolated by the pandemic and panicked that fritzing wifi meant they would fail the course. Rayne and my other two TAs were nothing short of magnificient – even at what must have been great cost both in terms of Zoom-tolerance and their other coursework demands -- and I would not have survived the course without them. They were bright spots in a dark semester.

By Spring of 2021, however, I was thrilled to be teaching upper level evidence, and to see Rayne join my course. Although she took the course pass/fail, she was her usual self – regularly contributing a sharp new insight or real-world implication. I can't help but notice that Rayne's transcript seems to reinforce my experience of her: she shines brightest in courses with an emphasis on research, writing, and thoughtful participation. I think it is those skills, along with her experience on the Journal of Legislation and Public Policy, that will serve her well as a law clerk. In sum, I highly commend Rayne to your consideration – she's an extraordinary young woman, who I am confident will make an exceptional law clerk.

Pleae do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Erin E. Murphy
Norman Dorsen Professor of Civil Liberties

BRENNAN CENTER FOR JUSTICE

June 6, 2022

RE: Letter of Recommendation for Rayne Ellis

To Whom it May Concern:

We write to recommend Rayne Ellis for a term clerkship in your chambers.

This recommendation is submitted jointly by Yurij Rudensky and Gowri Ramachandran, who respectively taught and supervised Rayne in the Brennan Center Public Policy Advocacy Clinic at the NYU School of Law.

Yurij is a senior counsel in the Democracy Program at the Brennan Center for Justice and an adjunct professor of clinical law the NYU School of Law. Gowri is a senior counsel in the Elections and Government Program at the Brennan Center for Justice.

Rayne worked closely with both of us from August through December 2020 in seminar and in her clinical fieldwork placement in the Brennan Center's Democracy Program. Rayne proved herself quickly as a resourceful, well-organized, and thorough researcher and a gifted communicator and writer. These abilities helped Rayne stand out as a great clinic student and make her a great candidate for your chambers.

The Brennan Center combines rigorous legal, policy, and empirical research with public writing, litigation, and legislative advocacy to reform the systems of democracy and justice in the United States. To succeed in clinic and meaningfully contribute to our work over the short 14-week term, students must gain a grasp of our substantive goals, position within the field, and advocacy objectives quickly. And because we work in dedicated project teams that requires effective communication and collaboration.

Rayne joined the team that focused on elections security and administration during the 2020 election season. She quickly understood the contours of the work and rapidly picked up the often highly technical background information to be well-versed in the relevant subject matter. She also understood our supportive role in the space at a time when election officials and infrastructure faced unprecedented strain across the U.S. She executed her projects at a high-level and demonstrated both flexibility in handling different sorts of assignments and resourcefulness. She wrote

Brennan Center for Justice at New York University School of Law
120 Broadway, Suite 1750 New York, NY 10271

clear and concise legal memos and displayed great creativity, taking on non-traditional assignments like quick reference documents for poll workers to inform them on how to handle emergencies. She was also resourceful in research going well beyond Westlaw to sources such as news articles, county-level websites, and leveraging friend/family relationships with actual voters to establish operative policies and relevant facts.

As you may imagine, the team that Rayne joined in fall 2020 had a tremendous volume of work that required triage and dispatch. Rayne's success flowed from her ability to work quickly and independently. This is all to say that Rayne impressed not just in the substance of her work, but also in her project management. Her team never had questions about the status of her projects and Rayne took time to clarify the scope of assignments she received to ensure that even her first efforts met expectations.

Just as importantly, Rayne's calm demeanor and maturity made her a pleasure to work with in an extremely high stress situation. While many often expect elections related work to slow down after Election Day, this was not the case for Rayne, who was assigned to support us with our advocacy for secure and accessible elections in Georgia. Due to a runoff election in that state, during which unprecedented volumes of malicious election disinformation were being spread by domestic actors, novel risks to running a smooth election presented themselves in the final weeks of her semester with us. Rayne was not only up to the endurance challenge, her steady attitude and consistently high-quality work helped the rest of us keep up our efforts as well.

In short, Rayne will make a great law clerk and we have no doubt that she will excel if given the opportunity in your chambers.

Please do not hesitate to reach out if you have questions about Rayne's qualifications.

Sincerely,

Yurij Rudensky
Senior Counsel, Democracy Program
Brennan Center for Justice

Gowri Ramachandran
Senior Counsel, Democracy Program
Brennan Center for Justice

WRITING SAMPLE

RAYNE H. ELLIS
88 Lexington Avenue
New York, NY 10016
(478) 335-8718
rayne.ellis@law.nyu.edu

The attached writing sample is my final assignment for Professor Jeremy Waldron's Human Dignity course. Students were tasked with fashioning a paper topic that touched on any of the formulations of dignity that we discussed throughout the course. The paper below, titled What Respect for Human Dignity Requires of Criminal Justice Reform in the United States, argues that there are small changes that must be made to the criminal justice system to work toward restoring the humanity of those who are currently interfacing with it, if we purport to be invested in their dignity. While the paper is largely theoretical, I would suggest reading Part II, Section b.—The Courts, which begins on page 14, and Part III—What Dignity Requires Immediately, which begins on page 32, for the most legal analysis.

What Respect for Human Dignity Requires of Criminal Justice Reform in the United States

I. Introduction

Suffering in the American system of criminal justice is commonplace; cruelty is enmeshed in every fiber; degradation is its very purpose. The United States has a criminal justice problem, meaning that, for many, justice is nowhere to be found. No matter the arm of the system, amount of discretion, or purported constitutionality of a particular policy, those who have been subjected to the vicious excesses of the system have been exposed to practices that attack the very humanity the U.S. government has based its legitimacy on protecting. And while there appears to be widespread recognition that change must come, attempts at reform have fallen short.

Advocates have been unsuccessful in mobilizing a coalition of lawmakers large enough to enact comprehensive reform. Disagreement on the causes, and therefore solutions, to the system's various problems have strangled progress. Eventually, agreement may be essential. The United States often finds itself repeating self-destructive behavior when it does not pull the source of a permeating issue out by its roots.[1] But the millions of men, women, and children who have been subjected to inhumane treatment can no longer wait for the Congressional shoe to drop. Perfect unity is a luxury their humanity cannot afford. So, while those aiming to overhaul the structure of the system do the necessary work of reimagining criminal justice in America, there have to be people working alongside them, advocating for immediate relief in the current system. Any consideration for the dignity of those incarcerated would mandate this multi-layered advocacy effort.

[1] *See*, Dan Glaun, *A Timeline of Domestic Extremism in the U.S. from Charlottesville to January 6*, PBS (Apr. 21, 2021), https://www.pbs.org/wgbh/frontline/article/timeline-us-domestic-extremism-charlottesville-january-6/ (chronicling the rise in white, domestic extremism and the frustration described by Trump Administration officials who revealed that the administration was not taking the threat seriously).

This paper identifies dignity as an organizing principle for small changes that must be made to the criminal justice system and attempts to underscore the importance that those changes are made in tandem with larger reform efforts. Part One of Section II will first operationally define the principle of human dignity and provide an overview of the problems in the system. Then, by surveying issues in the system, Part Two will elucidate the ways that the American criminal justice system fails to adhere to that principle with a particular focus on those that represent an abridgment for certain proxies of dignity such as: respect, autonomy, individuality, value. Section III will discuss the small changes that dignity requires of criminal justice reform. Section IV will be a brief discussion of penal systems in other liberal democracies in order to highlight that small changes are practicable.

II. The Problem: A Survey of How Criminal Justice Has Failed in America

Part One: Defining Dignity and America's Overarching Failures

The dysfunction in the United States criminal justice system is well documented and oft discussed. We are the world's largest jailer,[2] the developed world's harshest punisher,[3] and compared to other democracies, the least certain of what human dignity requires of our system of justice.[4] Right now, more than 2 million people are currently behind bars, 9 million cycle continuously through the country's vast network of local jails, more than 4.5 million are on probation or parole, and more than 70 million have conviction histories that subject them to a host of lifelong collateral consequences that touch every aspect of their lives.[5] Roughly half of all

[2] James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012).
[3] Mirko Bagaric & Sandeep Goplan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS L.J. 169 (2016).
[4] Human dignity is not mentioned in the U.S. Constitution or constitutional amendments.
[5] Ram Subramanian et al., *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. FOR JUSTICE (Dec. 9, 2020), https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform.

those incarcerated are Black; another 17 percent are Hispanic.[6] At least 16 percent of all jail admissions are suffering from a mental illness.[7] We imprison one-third of the estimated 625,000 women and girls who are incarcerated across the globe.[8]

Our scheme of sentencing, one with no mandated consideration of proportionality,[9] has made it such that nonviolent drug offenders and murderers can serve the same amount of prison time.[10] Only in the context of the death penalty death do courts explicitly confront the magnitude of their punishment discretion and the specific circumstances of the individual's suffering from those punishments.[11] It is a feature, not a side effect, that courts rarely consider the tragic pasts that may be partly responsible for criminal behavior or how the communities and families of a defendant will suffer during and long after imprisonment.[12]

That the American criminal justice system needs a rehaul is accepted by a growing number of individuals on both ends of the ideological spectrum; there is not, however, consensus on how to go about accomplishing such reform. Since the beginning of the 2021, 293 disparate bills relating to crime and law enforcement have been introduced in Congress.[13] Several states have considered legislation addressing aspects of the criminal justice system.[14] Just this year,

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[6] Cecil J. Hunt II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. BALT. L. REV. 313, 336-37 (2020).
[7] Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Human Punishment to Constitutional Discourse*, 41 U.C. DAVIS. L. REV. 111, 132 (2007).
[8] Spencer K. Beall, *Lock Her Up! How Women Have Become the Fastest-Growing Population in the American Carceral State*, 23 BERKELEY J. CRIM. L. 1, 4 (2018).
[9] Traditionally in the United States, if a sentence is within the predetermined guidelines, there is no room for proportionality review, whereas Canada has read a consideration of proportionality into its constitution.
[10] Justin Wm. Moyer*, A Drug Dealer Got a Life Sentence and Was Devastated. So Was the Judge Who Sentenced Him.*, WASH. POST (May 6, 2017), https://www.washingtonpost.com/local/a-drug-dealer-got-a-life-sentence-and-was-devastated-so-was-the-judge-who-sentenced-him/2017/05/04/efb81020-2aa0-11e7-9b05-6c63a274fd4b_story.html.
[11] Nilsen, *supra* note 7, at 114.
[12] Nilsen, *supra* note 7, at 114.
[13] *Crime and Law Enforcement*, GOVTRACK (2021), https://www.govtrack.us/congress/bills/subjects/crime_and_law_enforcement/5952#current_status[]=1.
[14] Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, THE APPEAL, https://theappeal.org/political-report/legislative-round-up/ (last visited June 18, 2021).

Oregon considered legislation against mandatory minimum sentencing and a bill that would enable people to vote from prison; the legislature in Texas considered a bill to speed up parole eligibility for people incarcerated since they were children; Virginia attempted to end some mandatory minimums and reduce solitary confinement.[15] So far, these bills have been held up in state legislatures. Less than a week into his presidency, Joe Biden signed an executive order prohibiting the Department of Justice from entering into new and renewed contracts with private prison companies, yet many advocates argued he did not go far enough.[16] Further, in his address to a Joint Session of Congress, and in the midst of George Floyd's trial, President Biden urged for action aimed at rooting out racism and reforming police departments.[17] And though at least one conservative was moved by his call to action,[18] the filibuster looms large over any significant reform bill that threatens to appear in the Senate chambers.[19] While it is true that perfect unanimity is not necessary to work toward change, disagreements about root causes, politics, and implementation goals have clogged the pathways toward accomplishing comprehensive reform.

Proper consideration of the dignity of those in the penal system could serve as a solvent for whatever blocks advocates from agreement by providing a foundation for urgency. Dignity, however, is an abstract concept, one with no generally agreed upon definition or explicit mention

[15] *Id*.
[16] Exec. Order No. 14,006, 86 Fed. Reg. 7,483 (Jan. 26, 2021); *see also* Madeline Carlist, *'Much More Work to be Done.' Advocates Call for More Action Against Private Prisons After Biden's 'First Step' Executive Order*, TIME (Jan. 29, 2021), https://time.com/5934213/private-prisons-ban-joe-biden/.
[17] President Joe Biden, Remarks to a Joint Session of Congress (Apr. 29, 2021), (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/).
[18] Abby Livingston, *Freshman GOP Texas Congressman Made a Personal Pitch to Joe Biden: Let Me Help With Criminal Justice Reform*, TEXAS TRIBUNE (April 29, 2021), https://www.texastribune.org/2021/04/29/tory-nehls-joe-biden/.
[19] Giovanni Russonello, *Democrats, About to Miss a Police Reform Deadline, Hold Out Hope*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/us/politics/police-reform-bill-biden-democrats.html.

in the U.S. Constitution,[20] and therefore must be operationalized before it can be deployed to mollify some of what ails the system.

Gerald Neuman's article *Human Dignity In United States Constitutional Law* distilled several of the principle's core tenets into six maxims: (1) that human beings possess an intrinsic worth that should be recognized and respected; (2) that all human beings possess this intrinsic worth equally by virtue of their humanity; (3) that the state exists for the sake of individual human beings; (4) that some forms of treatment of individuals are inconsistent with respect for this intrinsic worth; (5) that individuals have a right not to be subject to such treatment; (6) and that this intrinsic worth and the consequent right cannot be lost, alienated or forfeited (but it can be violated).[21]

Neuman's definition is incomplete, a fact which he himself noted. It lacks an evaluation of the source of the abovementioned worth, what characteristics of humanity give rise to it, or whether it is transferrable to other species. It does not specify what rights come with human dignity, nor does it determine what forms of treatment are categorically inconsistent with human dignity. This conception of dignity is not meant to answer every question but rather, serve as a functional baseline from which all the criminal justice policies in the United States can be evaluated.

It is important to note, that though dignity has no explicit mention in the Constitution, it played a significant role in its drafting. At the Constitutional Convention, the Framers held extensive debates on the nature of what individual rights should be protected and guaranteed,

[20] Cecil J. Hunt II, *The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration*, 29 J. CIV. RTS & ECON. DEV. 15, 34 (2016).
[21] Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, ZURE AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 241, 249-50 (Dieter Simon & Manfred Weiss eds. 2000).

leading to the addition of the Bill of Rights.[22] Further, the Declaration of Independence is rife with references to a vision of government that reflects a consciousness of individual dignity.[23] For example, it maintains that "all men are created equal, that they are endowed by their Creator with unalienable rights," and that those rights are meant to be protected by the government empowered by the governed.[24] Neuman goes so far to say that the "entire edifice" of U.S. Constitutional law is built on a vision of human dignity which is reflected by the mention of popular sovereignty, representative government, and entrenched individual rights in the framing documents.[25]

More recently, the Supreme Court has relied on the value of human dignity to interpret and establish the boundaries of what is protected under the Constitution, particularly in the Eighth Amendment jurisprudence prohibiting cruel and unusual punishment.[26] This understanding has been deployed to strike down the state-sanctioned execution of those with mental disabilities[27] and extended to cases involving prison conditions "antithetical to human dignity."[28] Though the court has only demonstrated a willingness to invoke human dignity in instances where the treatment of a human being shocks the conscience.[29]

Indeed, the absence of an explicit mention in the Constitution has not been fatal for dignity's relevance in the United States. The Declaration of Independence makes mention of equality and inalienable rights while establishing that the legitimacy of the newly established government relies on the consent of the governed. The Preamble to the Constitution recognizes

[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 252.
[26] Alison Shames & Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections*, 27 FED. SENT. R. 9, 11 (2014) [hereinafter *Doing the Right Thing*].
[27] *Id.* at 11 (citing Atkins v. Virginia, 536 U.S. 304 (2002).
[28] *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 745, 751 (2002)).
[29] *Id.*

its source of power as the people of the United States and identifies its purpose as to establish justice among other things.[30] But these founding documents, thought to be radical in their proclamation of human rights, also harbored protections for the institution of slavery and guarantees for slaveholders.[31] The Supreme Court's support for "separate-but-equal" in *Plessy v. Ferguson* further transmogrified the American conception of human rights so forcefully argued for by the founders in its legal authorization of disparate treatment.[32] It is this contradiction, this imperfect commitment to human dignity, that looms large over the history United States and continues to characterize its relationship to justice in the 21st century. Nowhere is the United States failing its citizens more than the criminal justice system.

Criminal justice in the United States implicates several of the government's functions and significant failure is pervasive no matter the sector. With Neuman's definition in mind, this section will address a number of critical violations of human dignity that persist in the criminal justice system categorized by whichever arm of the system it emanates from. The system will be divided into three components: law enforcement, the courts, and the correctional system. Some attention will be given to legislative failures and post-release factors. The purpose of this survey is meant to draw attention to a wide range of indignities pervasive in the system, however, it will not be able to capture the full scope of the ways in which the United States criminal justice system is failing and will not attempt to.

Part Two: The Specifics of America's Failure to Respect Dignity

a. Law Enforcement

[30] Neuman, *supra* note 21, at 252.
[31] Neuman, *supra* note 21, at 252.
[32] Neuman, *supra* note 21, at 252.

As a result of several high-profile police killings of mostly unarmed, mostly black citizens, police departments and other law enforcement agencies ("police") have received a significant amount of public scrutiny.[33] Police are given broad, constitutionally-protected discretion.[34] They are frequently asked to respond to issues that they are not equipped for or trained to address, like mental health emergencies or homelessness.[35] Many departments have enormous budgets compared to other vital community programs.[36] Their training focuses largely on the use of force rather than reducing the need for it.[37] In turn, the police shoot, choke, physically assault, and blind individuals with impunity;[38] frequently in response to minor infractions.[39]

But even more sinister is the apparently symbiotic relationship between policing and white supremacy in America. In a report published by the Brennan Center for Justice, former FBI agent Michael German evaluated the government's response, or lack thereof, to the pervasiveness of white supremacy in police departments.[40] Usually, after incidents of racist

[33] Khaleda Rahman*, From George Floyd to Breonna Taylor, Remembering the Black People Killed by Police in 2020*, NEWSWEEK (12/29/2020), https://www.newsweek.com/george-floyd-breonna-taylor-black-people-police-killed-1556285; *see also* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html.
[34] *See*, Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 265 (2010).
[35] *Policing in America*, EQUAL JUST. INITIATIVE, https://eji.org/issues/policing-in-america/ (last visited June 22, 2021).
[36] *Id.*
[37] Margaret Harding McGill & Erica Pandey, *America's Broken System of Training Cops*, AXIOS (June 7, 2020), https://www.axios.com/police-training-george-floyd-2654f96d-fc58-4c59-8d04-e279f50c7107.html.
[38] *See* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel–Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html; Joseph Wilkerson, *California Cop Who Blinded Woman in One Eye with Beanbag Round Not Charged with Crime*, N.Y. DAILY NEWS (Jan. 7, 2021), https://www.nydailynews.com/news/national/ny-san-diego-cop-blind-woman-beanbag-round-not-charged-20210107-wwzwdqp4mrauflz2cagni7ew7e-story.html.
[39] Michael Balsamo, Michael R. Sisak, Colleen Long & Tom Hays*, Police Officer in 'I can't breathe' Death Won't be Charged*, AP NEWS (July 16, 2019), https://apnews.com/article/new-york-ny-state-wire-nyc-wire-brooklyn-staten-island-3c72405c9f874844a84b0ca658402078.
[40] Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUSTICE (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law/.

misconduct or brutality by the police, communities are energized to seek reform. An aspect of those reforms often focuses on addressing unconscious manifestations of bias and explicit reaffirmation of the goal to protect the "dignity, rights, and safety of all people."[41] For example, the U.S. Department of Justice (DOJ), demands implicit bias training and as part of the consent decrees it imposes in order to root out discriminatory practices in law enforcement agencies.[42] These efforts, however, work poorly against the sizeable number of individuals in law enforcement who harbor explicitly racist beliefs.

Explicit racism in a police officer can manifest in a number of ways: from membership or affiliation with violent white supremacist or far-right militant groups, to engaging in racially discriminatory behavior toward the public or law enforcement colleagues, to racist social media posts.[43] In Miami, Florida, police officers choked, arrested, and prosecuted a 14-year-old boy after he allegedly gave them a dehumanizing stare; he was bottle feeding a new born puppy.[44] Two officers in Aurora, Colorado ordered a black family with four children, one as young as six, out of a vehicle at gunpoint and made them lie face down on the ground.[45] One of the New York Police Department's highest-ranking officers, Christopher McCormack, allegedly subjected at least two dozen Black and Latino men to invasive, humiliating strip searches, which one victim

[41] Press Release, Dep't of Justice, *Justice Department Reaches Agreement with City of Baltimore to Reform Police Department's Unconstitutional Practices* (Jan. 12, 2017), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-baltimore-reform-police-department-s; *see also* German, *supra* note 40.
[42] German, *supra* note 40.
[43] German, *supra* note 40.
[44] *Police Abuse of People of Color Is Not Limited to Shooting Deaths*, EQUAL JUST. INITIATIVE (July 14, 2016), https://eji.org/news/police-abuse-of-people-of-color-not-limited-to-fatal-shootings/.
[45] Michael Levenson, *Officers Who Handcuffed Black Family Won't be Charged, Prosecutors Say*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/us/aurora-colorado-police-black-family.html.

compared to sexual abuse.[46] In Chicago, officers raided the home of a social worker, who was left naked and handcuffed for 20 minutes.[47]

Then there are countless instances of racism on social media; A North Charleston policeman posted a photo of himself in Confederate flag underwear a few days after the nine black worshippers at Emanual AME Church were murdered. [48] A Phoenix officer proclaimed in a post, "It's a good day for a choke hold."[49] An officer from Detroit said that he "would kill himself" if he were born Black.[50] Officers in San Jose, California were suspended for their participation in a Facebook group that regularly posted racist and anti-Muslim content.[51]

A review of police behavior on Facebook documented the systemic nature of the racist behavior across several departments in the country and revealed a disturbing pattern of racist imagery and vitriolic exchanges.[52] A Chicago-based nonprofit newsroom then used that database and found that many officers who made offensive posts were also accused of brutality or civil rights violations.[53]

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[46] Joaquin Sapien, Topher Sanders & Nate Schweber, *Over a Dozen Black and Latino Men Accused a Cop of Humiliating Invasive Strip Searches. The NYPD Kept Promoting Him*, PROPUBLICA (Sept. 10, 2020), https://www.propublica.org/article/over-a-dozen-black-and-latino-men-accused-a-cop-of-humiliating-invasive-strip-searches-the-nypd-kept-promoting-him.
[47] Peter Nickeas, *Behind the Mistaken Raid by Chicago Police on an Innocent Social Worker's Home,* CNN.COM (Dec. 20, 2020), https://www.cnn.com/2020/12/19/us/chicago-police-mistaken-raid/index.html.
[48] Andrew Knapp, *Police Officer Fired for Confederate Flag Underwear Settles Lawsuit Against City for $55,000*, POST AND COURIER (Sep. 14, 2020), https://www.postandcourier.com/news/police-officer-fired-for-confederate-flag-underwear-settles-lawsuit-against/article_03a2cb4c-bb43-11e7-b1e6-0f236c2bd1e2.html.
[49] Emily Hoerner & Ricky Tulsky, *Cops Across the US Have Been Exposed Posting Racist and Violent Things on Facebook. Here's the Proof.*, BUZZFEED NEWS (July 23, 2019), https://www.buzzfeednews.com/article/emilyhoerner/police-facebook-racist-violent-posts-comments-philadelphia.
[50] Frank Witsil, *Warren Police Investigating Officer Accused of Posting Racist Comments on Facebook*, DETROIT FREE PRESS (June 15, 2021), https://www.freep.com/story/news/2021/06/15/warren-police-racist-facebook-posts/7700854002/.
[51] Jason Green & Robert Salonga, *San Jose Police Officers Posts Exposed by Blogger*, MERCURY NEWS (June 26, 2020), https://www.mercurynews.com/2020/06/26/san-jose-police-officers-racist-facebook-posts-exposed-by-blogger/.
[52] Hoerner & Tulsky, *supra* note 49.
[53] Hoerner & Tulsky, *supra* note 49.

Countless officers have been exposed for racist texts or emails in San Francisco, Los Angeles, and Portland.[54] Officers in Wilmington, North Carolina were caught on a car camera using racial epithets, talking about shooting Black people (including an officer). One even said he couldn't wait for Martial law so they could go out and "slaughter" Black people.[55]

These instances of inhumane treatment institute a pattern of humiliating and degrading treatment of people of color by actors in the U.S. criminal justice system. Some argue that humiliation and degradation are dependent on dignity in that the former implicate an injury to the latter.[56] While this injurious behavior is not explicitly sanctioned, its historical impunity has irrevocably transformed the relationship between people of color and the government built to protect them. That which affirmatively humiliates and degrades, erodes the dignity of both the victim and the punisher.

The problem is widespread. And the behavior that emanates from these ideological leanings could be devastating for an individual and/or a community. Federal, state, and local governments do very little to identify them, report their behavior, or protect the diverse communities they are directed to serve.[57] It is not impossible to imagine a scenario where a prosecutor solicits testimony from an officer in a criminal case and that same officer is making racist posts on social media.[58] This revelation makes it more difficult to ignore the ways in which

[54] Scott Glover, *'Wild Animals': Racist Texts Sent by San Francisco Police Officer, Documents Show*, CNN.COM (Apr. 26, 2016), https://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/index.html; Michael Pearson, *Los Angeles County Sheriff Official Resigns over Racist Messages*, CNN.COM (May 2, 2016), https://edition.cnn.com/2016/05/02/us/los-angeles-sheriff-chief-tom-angel-racist-emails/index.html; Katie Shepherd, *Texts Between Portland Police and Patriot Prayer Ringleader Joey Gibson Show Warm Exchange*, WILLAMETTE WEEK (Feb. 14, 2019), https://www.wweek.com/news/courts/2019/02/14/texts-between-portland-police-and-patriot-prayer-ringleader-joey-gibson-show-warm-exchange/.
[55] Wilmington Police Department, *Profession Standards Report of Internal Investigation*, at 8 (June 11, 2020), https://www.wilmingtonnc.gov/home/showdocument?id=12012.
[56] Daniel Statman, *Humiliation, Dignity, and Self-Respect*, 13 PHILOSOPHICAL PSYCHOLOGY 523 (2010).
[57] German, *supra* note 40.
[58] Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely upon Their Testimony at Trial?,* THE APPEAL (July 29, 2019), https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police/.

Black and Brown men are overwhelmingly and systematically targeted by the police in the United States. While Black Americans account for only 13 percent of the population, they make up a quarter of all police shooting victims.[59] An unarmed Black man is about four times more likely to be killed by police than an unarmed white man.[60]

This brutality is not limited to lethal force. People of color in the United States are subjected to beatings, threats, and other forms of humiliation and disrespect that are less lethal, but still impact the psyche. One study by the Center for Policing Equity, using data from police departments around the country, found that police are 3.6 times as likely to use force against Black people than white people.[61] Another study found by an economics professor at Harvard that Black people were 50 percent more likely to be subjected to nonlethal force by the police, like being handcuffed, pushed to the ground, or hit with pepper spray.[62] A Black person is five times more likely to be stopped without just cause than a white person.[63] Black drivers been more likely to be stopped than white drivers and are more likely to be searched and arrested.[64] In 2016, Black Americans comprised 27 percent of all individuals arrested in the United States, more than double their share of the total population.[65] That same year, Black youth account for 15% of all U.S. children yet made up 35% of juvenile arrests.[66] This disparity in treatment

[59] Joe Fox, Adrian Blanco, Jennifer Jenkins, Julie Tate & Wesley Lowery, *What We've Learned About Police Shootings 5 Years After Ferguson*, WASH. POST (Aug. 9, 2019), https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/?arc404=true [hereinafter *Police Shooting Report*].
[60] *Id*.
[61] Benedict Carey & Erica Goode, *Police Try to Lower Racial Bias, but Under Pressure, It Isn't So Easy*, N.Y. TIMES (July 16, 2016), https://www.nytimes.com/2016/07/12/science/bias-reduction-programs.html?smid=pl-share.
[62] *Id*.
[63] *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited June 25, 2021) [hereinafter *Fact Sheet*].
[64] *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.
[65] *Id.*
[66] *Id.*

weighs heavily on Black Americans. Police killings of unarmed Black people are responsible for more than 50 million additional days of poor mental health per year among Black Americans.[67]

Police cruelty is not only reserved for people of color. White Americans are abused and killed by police at grotesquely high rates compared to other rich nations.[68] In fact, though black Americans are shot at a disproportionate rate, half of all people shot and killed by police are white;[69] a talking point many conservatives have used to demonstrate that the problem with policing is not borne out of racism. This simply underscores the fact that it is not *only* racism that triggers the need for dignity-centric police reform, but rather, the way in which police interact with society must be entirely reimagined. More than 2,500 police departments have shot and killed at least one person since 2015.[70] Since 2015, police have shot and killed an average of 3 people per day.[71] In 2020 alone, 1,126 people were killed by police.[72] Most of those deaths were by shootings, but other forms of physical force, tasers, and police vehicles accounted for the other deaths.[73] Many of the officers committing these acts of violence had shot and killed someone before.[74] Most killings happened as a result of police responding to suspected non-violent offenses or in instances where no crime was reported.[75] 120 people were killed after police stopped them for a traffic violation.[76] 97 people were killed after responding to reports of someone behaving erratically or having a mental health crisis.[77]

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[67] *Fact Sheet*, *supra* note 63.
[68] Alexei Jones & Wendy Sawyer, *Not Just "a Few Bad Apples": U.S. Police Kill Civilians at Much Higher Rates Than Other Countries*, PRISON POL'Y INITIATIVE (June 5, 2020), https://www.prisonpolicy.org/blog/2020/06/05/policekillings/.
[69] *Police Shooting Report*, *supra* note 61.
[70] *Police Shooting Report*, *supra* note 61.
[71] *Police Shooting Report*, *supra* note 61.
[72] *2020 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/ (last visited Oct. 25, 2021).
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.

Exploiting the instances of white victimization in order to diffuse responsibility from racist practices and policies does little to address the source of the concern. There is an unambiguous lack of consideration of human dignity in law enforcement. That it overwhelmingly targets one particular caste of individuals is certainly the result of unaddressed racism in all arms of the criminal justice system, as well as a functional lack of accountability and introspection into the role this particular arm plays into the perpetuation of this reality. It would be impossible to list the numerous iterations of dignity-violating cruelty that persist in policing. Nonetheless, the issue can at least in part be blamed on carelessness and comfort in complicity.

b. The Courts

Like law enforcement, the court system is rampant with instances of cruelty and treatment violative of human dignity. Since violence, however, does not characterize the court's interaction with most, these violations tend to be more subtle and avoid the piercing eyes of public scrutiny. Still, courts significantly contribute to the failures of the American criminal justice system. Those subtle violations can range from imposing severe sentence lengths, to requiring shackles for hearings, to refusing to address the defendant directly. There is also the additional concern of plea bargaining, the incentives overworked courts have to avoid jury trials, and the ways in which ill-informed defendants get taken advantage of for the sake of efficiency. Nonetheless, all feed into a system of dehumanization, meant primarily to prepare the offender for the ultimate deprivation of dignity and liberty in the American correctional system.

As mentioned previously, American punishment has become "degrading, indecently, and undeservedly harsher, despite a constitution designed to protect people from infliction of

excessive punishment."[78] One particularly egregious way that courts contribute to that problem is by not weighing certain critical factors when making decisions about what kind of punishment to deliver. For example, the court does not consider the human cost of those punishments (unless facing the death penalty), the inhumane treatment the person being sentenced is likely to face, or that time in prison provides poor preparation for a productive life afterwards.[79]

What's worse, the American scheme of justice does not provide real proportionality review for criminal sentencing outside of the death penalty.[80] This is despite the Court's decision in *Solem v. Helm*[81] which found that the Eighth Amendment prohibits not only barbaric punishment, but also punishments that are disproportionate to the offense. *Solem* also created the threshold test of "gross proportionality," which listed three factors, any of which might have a sufficient role in a sentence to invalidate it: (1) "the gravity of the offense and the harshness of the penalty[;]…(2) the sentences imposed on other criminals in the same jurisdiction[; and] (3)the sentences imposed for commission of the same crime in other jurisdictions."[82] This test was then reinterpreted and narrowed in *Harmelin v. Michigan*,[83] where the court interpreted the factors as each by themselves sufficient to save a sentence, regardless of the weight a court might attach to the other two, making it rare for a sentence to fail the test.[84]

In Harmelin, the Court was tasked with determining whether a life sentence without the possibility of parole was excessive under the Eighth Amendment and whether Harmelin had a right to have his sentence determined on the individual facts of his crime and background rather

[78] Nilsen, *supra* note 7, at 113.
[79] Nilsen, *supra* note 7, at 114.
[80] Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3184 (2015).
[81] 463 U.S. 277, 284 (1983) (holding unconstitutional a life without parole sentence imposed on a petty offense recidivist).
[82] *Id.* at 290-91.
[83] 501 U.S. 957, 1004-05.
[84] Nilsen, *supra* note 7, at 148.

than the one-size-fits-all mandatory life sentence.[85] Harmelin, a former Air Force honor guard, was convicted for possession of a pound and a half of cocaine. He had no history of violence and no criminal history. The court upheld his sentence against both claims.[86]The penalty, at the time it was dealt out, was the same as that of first-degree murder.[87]

The court applied this test again in *Ewing v. California*.[88] In Ewing, the Court found no disproportional punishment in upholding California's application of the state's "third strike" recidivism law, which sentenced Gary Ewing to twenty-five-years-to-life for stealing three golf clubs.[89] Justice Breyer warned in his dissent that "a threshold test that blocked every ultimately invalid constitutional claim –even strong ones– would not be a threshold test but a determinative test."[90] Justice Breyer's warning proved to be foreshadowing. These days, the test of gross proportionality does little to no work in correcting the criminal justice system of its excesses, nor does it protect victims from state-sponsored violations of their dignity. Gary Ewing and Ronald Harmelin's stories are ones that have come to characterize the administration of justice in America.

And though courts and legislatures have taken steps reform the same "three strikes" laws and mandatory minimum penalties that doomed Gary Ewing and Ronald Harmelin to toil in prison for life, [91] the progressive movement has not yet reached every jurisdiction in the country. For example, in 2020 the Mississippi Supreme Court sentenced a man to 12 years in prison for

[85] Nilsen, *supra* note 7, at 113.
[86] Harmelin, 501 U.S. 957, 996 (1991).
[87] Ruth Marcus, *Life in Prison for Cocaine Possession?*, WASH. POST (Nov. 5, 1990), https://www.washingtonpost.com/archive/politics/1990/11/05/life-in-prison-for-cocaine-possession/7667b420-79f4-4a4f-984d-cc32cee422fa/v.
[88] 538 U.S. 11 (2003).
[89] *Id.* at 29-31.
[90] *Id.* at 43 (2003) (Breyer, J., dissenting).
[91] Elizabeth Weill-Greenberg, *'It Tears Families Apart': Lawmakers Nationwide Are Moving to End Mandatory Sentencing*, THE APPEAL (Apr. 15, 2021), https://theappeal.org/it-tears-families-apart-lawmakers-nationwide-are-moving-to-end-mandatory-sentencing/.

possessing a cellphone in a county jail. Willie Nash, a married father of three, asked a guard for "some juice" to charge his cell phone.[92] The phone was confiscated and the jury sentenced him to 12 years in prison.[93] At his hearing the trial said that "while his crime may have seemed insignificant to him, there was a reason [that] possessing a cell phone in a correctional facility was 'such a serious charge.'"[94] The judge also told Nash to consider himself fortunate since his numerous burglary convictions could have triggered a habitual offender law which would have subjected him to a fifteen-year sentence.[95] Though the Mississippi Supreme Court found the case to be "harsh," Nash's sentence fell within the statutory range of three to 15 years and he was unable to demonstrate that a threshold comparison of the crime committed to the sentence imposed led to an inference of gross disproportionality. Therefore, his conviction was affirmed.[96]

In the absence of statutorily prescribed proportionality review, judges are unable to intervene on the behalf of the defendant, even when faced with even the most sympathetic cases. In the case of *United States v. Angelos*,[97] Judge Cassell begrudgingly passed a 55-year sentence on 25-year-old man convicted of selling marijuana, possessing firearms, and money laundering, stating, "While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties."[98] The judge

[92] Nash v. State, 293 So.3d 265, 266 (Miss. 2020).
[93] Minyvonne Burke, *Mississippi Man Gets 12 Years in Prison for Possessing a Cellphone in County Jail*, NBC News (Jan. 17, 2020), https://www.nbcnews.com/news/us-news/mississippi-man-got-12-years-prison-possessing-cellphone-county-jail-n1117951.
[94] Nash, 293 So.3d at 267.
[95] *Id.*
[96] Nash, 293 So.3d at 266 (Miss. 2020).
[97] United States v. Angelos, 345 F.Supp.2d 1227 (D. Utah 2004), *aff'd* 433 F.3d 738 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 723, 723 (2006).
[98] *Id.* at 1230.

reasoned that he could not act on his own finding that the sentence appeared cruel and unusual because a previous sentence upheld in the Supreme Court in *Hutto v. Davis* bound him.[99]

And though judges and juries are the parties who essentially swing the sword, a lot of times they are legally bound to pass harsh sentences because of the charges brought before them. This isn't to say that judges are not to blame for their role in perpetuating the indignities of the criminal justice system, far from it. In fact, there are a number of little indignities that judges commit under the guise of maintaining order in the court room. For example, requiring that convicted prisoners wear shackles in civil trial proceedings,[100] not addressing the criminal defendant directly in court, not informing the incarcerated individual of their right to appear in civilian clothes.[101]

There are also countless instances when judges exceed their authority and pass sentences that far exceed what any legislature would allow, and they do so with impunity.[102] A judge in Alabama sentenced a single mother to 496 days behind bars for failing to pay traffic tickets, exceeding the jail time Alabama allows for negligent homicide. As a result, the mother's three children were thrust into foster care, where one daughter was molested and another was physically abused.[103] That mother was one of hundreds the judge threw in jail for failure to pay fines; to list some of the others: a plumber struggling to make rent, a mother who skipped meals to cover her disabled son's medical bills, a hotel housekeeper working to pay for college.[104]

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[99] Nilsen, *supra* note 7, at 151 (2007) (explaining that a forty-year prison sentence for possession of nine ounces of marijuana with intent to sell it was upheld by the Supreme Court).
[100] Nhut G. Tran & Reena Kapoor, *Shackling Convicted Prisoners During Civil Trial Proceedings*, 48 J. AM. ACAD. PSYCHIATRY L. 117 (2020).
[101] Richard R. Shiarella, Comment Note, *Propriety and Prejudicial Effect of Compelling Accused to Wear Prison Clothing at Jury Trial – State Cases*, 99 A.L.R.6TH 295 (2021).
[102] Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/.
[103] *Id.*
[104] *Id.*

There are thousands of other instances of judicial misconduct, some so corrosive on the pursuit of justice that they call the validity of the entire system into question. A judge in Texas burst in on jurors deliberating the case of a woman charged with sex trafficking and declared that God told him that the defendant was innocent.[105] A judge in Alabama chose his own son in at least 200 cases to serve as a court-appointed defense lawyer for the indigent, enabling the son to earn at least $105,00 in fees over two years. [106] Pennsylvania had to expunge the criminal records for 2,251 juveniles after discovering that two judges were taking kickbacks as a part of scheme to fill a private juvenile detention center.[107] The judiciary is not always at fault in such corrupt ways, but it is always complicit.

Often, when the judges are not directly at fault, it is because the prosecutor, in a completely lawful exercise of discretion, has concocted a particularly cruel set of charges. For example, in Nash, the defendant was charged under Mississippi Code Section 47-5-193 which makes it unlawful for an individual in prison to "posses, furnish, attempt to furnish, or assist in furnishing to any offender confined in [Mississippi] any weapon, deadly weapon, unauthorized electronic device, contraband item, or cell phone."[108] In authorizing prosecutors to pursue 3 to 15 years[109] for violators of this provision, the legislature likely expected for prosecutors to use their discretion wisely. Instead, the prosecutor in Nash sought four times the statutory minimum for the innocuous possession of a cell phone; one that likely would not have been on his person if booking procedure for the county jail was actually followed.[110]

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[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] MISS. CODE ANN. § 47-5-193 (2015).
[109] MISS. CODE ANN. § 47-5-195 (2015).
[110] Nash, 293 So.3d at 270-71 (King, J., concurring).

In *Angelos*, prosecutors pursued charges under a notoriously harsh federal law instead of less harsh state charges.[111] The relevant statute, 18 U.S.C. § 924(c), carried an obligatory five-year sentence for possessing a firearm during a drug transaction and a twenty-five-year sentence for each subsequent transaction.[112] Multiple charges can be brought under § 924(c) in one case. The mandatory sentences must be served consecutively, as opposed to simultaneously. A criminal record is not a prerequisite to open oneself up to prosecution under this statute.[113] The firearm does not have to be brandished or used, nor does the law require any form of violence or injury to be caused or threatened.[114] When prosecutors charged Angelos with three § 924(c) counts, they damned him to a predetermined 55 years in prison.

The American criminal justice system bestows a significant amount of power onto prosecutors. As professors Erik Luna and Marianne Wade described in their discussion of prosecutorial power, their nearly limitless discretion has the ability to expedite or hinder the pursuit of justice:

> They decide whether to accept or decline a case; and on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects if pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed on conviction.[115]

[111] Erik Luna & Marianne Wade, *Prosecutorial Power: A Transnational Symposium: Prosecutors as Judges*, 67 WASH & LEE L. REV. 1413, 1415 (2010).
[112] 18 U.S.C. § 924(c)(1)(2006).
[113] *Id*.
[114] Luna & Wade, *supra* note 111, at 1415.
[115] Luna & Wade, *supra* note 111, at 1415.

Prosecutors are, in a sense, law enforcement officers and judges in the way that they have the power to enforce and sentence. Some scholars go as far as suggesting that prosecutors themselves *are* the criminal justice system.[116] They wield a significant amount of concentrated power and have nearly unfettered discretion. Additionally, prosecutors have an unreviewable ability to decline cases and their decisions cannot be overturned by judges.[117] Meaning, ultimately, that prosecutors have the power to refuse to seek justice on the behalf of persons who have been wronged. Their decisions shed light on whose victimhood is valued and who is seen as worthy of protection in the eyes of the state. A Washington Post analysis found that of the nearly 50,000 homicides committed around the country, an arrest was made in 63 percent of murders of white victims, compared to 48 percent of Latinx victims, and 46 percent of Black victims.[118] Respect for the dignity of victims of color would come in the form of more justice.

Abuse and misconduct are widespread in this arm of the system. Consequences for those abuses, however, are few and far between. Courts frequently grant prosecutors immunity from civil lawsuits and prosecutors are almost never tried in criminal court for their actions.[119] The following is a non-exhaustive list created by the National Police Accountability project of the type of misconduct for which prosecutors are entitled to absolute immunity because these actions purportedly relate to their role in the judicial process: falsifying evidence; coercing witnesses; soliciting and knowingly sponsoring perjured testimony; withholding exculpatory evidence and/or evidence of innocence; introducing evidence known to be illegally seized at trial;

[116] Luna & Wade, *supra* note 111, at 1415.
[117] Luna & Wade, *supra* note 111, at 1428.
[118] Wesley Lowery, Kimbriell Kelly, Ted Mellnik & Steven Rich, *Where Killings Go Unsolved*, WASH. POST (June 6 2018), https://www.washingtonpost.com/graphics/2018/investigations/where-murders-go-unsolved/.
[119] *Abuse of Power by Prosecutors*, FAIR FIGHT INITIATIVE, https://www.fairfightinitiative.org/abuse-of-power-by-prosecutors/ (last visited Oct. 25, 2021).

initiating a prosecution in bad faith.[120] This functional immunity carved out for prosecutors has made it difficult for advocates to hold them accountable, even for particularly egregious behavior.

The above concerns do not even address the twisted incentives associated with pleas. These incentives implicate a whole host of failures in the American criminal justice system: the public defense system, cash bail, jury trials, prosecutorial deference, overrun court dockets. Coercion and decision-making under duress characterize the institution of plea negotiations and plea deals have overrun the American criminal justice system. In 2018, 90 percent of the nearly 80,000 defendants in federal criminal cases plead guilty.[121] Maybe each individual was guilty, but it is more likely that insidious factors were at play. For example, it is not unimaginable that the defendant would be the breadwinner in a family with four children and rather than waiting six months for a trial, they would take the plea deal.[122] Perhaps they were informed that fewer than one percent of those who go to trial for federal criminal charges are acquitted.[123] Or maybe, the defendant does not want to be subjected to the tremendous deprivation of privacy that tends to define jury trials. Ultimately, the success of the plea incentive structure is at least in part due to a settled expectation of humiliation in American courts, though the alternative still degrades. Defendants' dignity will suffer either way.

Last year prosecutorial ethics became a topic of national conversation as a result of two tragic shooting deaths of Black people: Ahmaud Arbery and Breonna Taylor.

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[120] *Learn About the Effects of Absolute Immunity for Prosecutors. Read More Below.*, NAT'L POLICE ACCOUNTABILITY PROJECT, https://www.nlg-npap.org/absolute-immunity/ (last visited Oct. 26, 2021).
[121] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.
[122] Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.
[123] Gramlich, *supra* note 121.

In Brunswick, Georgia, Ahmaud Arbery, a 25-year-old black man, was chased by three white men in a pick-up truck while jogging through a neighborhood. Two of the men, a father and son named Travis and Gregory McMichael, then exited the truck with guns and shot him after the confrontation.[124] Travis McMichael then muttered a racial slur after taking Mr. Arbery's life.[125] The McMichaels were not arrested at the time; due, allegedly, to instructions from Brunswick District Attorney Jackie Johnson, who had worked with the elder McMichael for a number of years in her capacity as a district attorney.[126]

Not only did Johnson wait four days to report the conflict to the Georgia attorney general's office, but she also authorized neighboring District Attorney Paul Barnhill to handle the matter in direct contravention of Georgia law.[127] Barnhill had conflicts of his own, as his son was an assistant district attorney working for District Attorney Johnson at the time and had worked with Greg McMichael in a prosecution of Arbery when Arbery was in high school.

Barnhill did not disclose his disqualifying conflict of interest until April 7, weeks after he was made aware of his son's relationship with both the suspect and the victim. In the weeks before reporting his conflict, Barnhill also authored a controversial written opinion to the Glynn Police Department and subsequent prosecutor insisting that there were no grounds to arrest the McMichaels.[128] Both McMichaels were arrested on May 7, charged with murder and aggravated assault, and later indicted alongside William Bryan, who filmed the encounter.[129] Johnson has

[124] David L. Hudson Jr., *Prosecutorial Ethics Are in the Spotlight After the Death of Ahmaud Arbery*, ABA JOURNAL (July 16, 2020), https://www.abajournal.com/web/article/prosecutorial-ethics-are-in-the-spotlight-after-the-shooting-of-ahmaud-arbery.
[125] Brakkton Booker, *White Defendant Allegedly Used Racial Slur After Killing Ahmaud Arbery*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/869938461/white-defendant-allegedly-used-racial-slur-after-killing-ahmaud-arbery.
[126] Hudson Jr., *supra* note 124.
[127] Hudson Jr., *supra* note 124.
[128] Hudson Jr., *supra* note 124.
[129] Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Apr. 29, 2021), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.

been voted out of office and is now the subject of a grand jury probe by the State Attorney General Chris Carr.[130]

A few months later in Louisville, Kentucky, Attorney General Daniel Cameron's actions in the wake of the shooting death of Breonna Taylor drew a lot of attention to the amount of power prosecutors hold. After spending six months investigating the shooting that resulted in cops killing Taylor while sleeping in her own home, he only recommended charges of wanton endangerment against one of the three officers who all fired a total of 32 shots into her apartment that night in March.[131] That was the sole charge jurors were allowed to consider, not whether the officers committed murder or manslaughter.[132]

Cameron also did not initially disclose that wanton endangerment was the only charge he presented to jurors.[133] And after a judge ordered that he release the grand jury recordings, many argued that he heavily relied on witnesses that supported the officers' version of the events.[134] Further, after a juror argued before a judge that all recordings, transcripts, and files relating to the grand jury proceedings be released, Cameron filed a motion to prevent the juror from speaking publicly about the case, citing irreversible alterations to Kentucky's legal system.[135] And though his behavior was neither illegal, nor out of the ordinary for prosecutors, Cameron's actions alarmed the community who was incredulous to find out that the in the eyes of the criminal justice system, no one killed Breonna Taylor.[136]

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[130] Bran Schrade, *Former Brunswick District Attorney General Focus of Grand Jury Probe*, ATLANTA JOURNAL-CONSTITUTION (June 18, 2021), https://www.ajc.com/news/crime/former-brunswick-district-attorney-focus-of-grand-jury-probe/5D3R3VSIDFD7NEKXPT5DVAWI2E/.
[131] Fabiola Cineas, *The Breonna Taylor Case Proves That Prosecutors Have Too Much Power*, VOX.COM (Oct. 14, 2020), https://www.vox.com/21514887/breonna-taylor-daniel-cameron-prosecutor.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id*.

The policies and procedures practiced by the above-mentioned sectors of the court are in unmistakable conflict with the principles of human dignity in that courts, and all those associated, categorically fail to value each individual's intrinsic value in a number of ways. Here, the absence of dignity is masked by the sanitized process. Judges are not physically holding their knees on the necks of defendants, but rather contributing to their overall mental and emotional strangulation by ignoring individual circumstances and doling out severe sentences to petty offenders outside of the scope of their authority, among other things.

c. The Correctional System

Millions of Americans are incarcerated in overcrowded, violent, and inhumane jails and prisons that do not provide adequate treatment, education, or rehabilitation.[137] Incarcerated people are beaten, stabbed, raped, and killed at an alarming rate in facilities run by corrupt officials who infrequently face consequences.[138] Those who are not physically assaulted bare witness, and suffer trauma as a result.[139] The number of mentally ill prisoners has soared dramatically as mental institutions have shuttered throughout the nation.[140] It is estimated that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates have a mental health problem.[141] Additionally, those in solitary confinement are subjected to strict isolation for twenty-three hours a day.[142] The prison conditions criticized by the Court in *Hutto v.*

[137] *Prison Conditions*, EQUAL JUST. INITIATIVE, https://eji.org/issues/prison-conditions/ (last visited Oct. 26, 2021).
[138] *Id.*
[139] Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/.
[140] Nilsen, *supra* note 7 at 11.
[141] KiDeuk Kim, Miriam Becker-Cohen & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, URBAN INST. (Apr. 7, 2015), https://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system.
[142] Nilsen, *supra* note 7, at 111.

Finney four decades ago—the reality of solitary confinement, inmate safety and health, crowded sleeping arrangements, and increased violence—have all only worsened.[143]

The American criminal justice system has a high tolerance for degradation generally, but nowhere is that tolerance more odious than in its prisons. Even a brief survey of the ways that the correctional system violates human dignity would be an article unto itself. Here, since the purpose of this article is not to illuminate the countless ways that the corrections system currently violates notions of dignity, but rather to indict the system in order to proffer small but meaningful solutions, this portion will discuss broader themes.

It could be said that the very existence of the carceral state as an institution is violative of human dignity because its very purpose is to deprive an individual of liberty and autonomy; two principles oft associated with human dignity. Pursuing this line of thought to its logical conclusion, it follows that the carceral state would need to be abolished in order to be more cognizant of individual dignity. Though the dignitarian's case for abolition is readily made, that argument will not be made here. The current conditions of confinement demand expediency.

For example, in 2019 the Justice Department's Civil Rights Division released a summary of its investigation of Alabama's state prisons for men.[144] The overarching issues examined in the report depict an image of the American prison system generally; overcrowding contributes to serious harm; "severe understaffing" exposes prisoners to harm; prisoners are not adequately protected from violence; there is a lot of death; there is a lot of rape; there is not enough supervision.[145]

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[143] Nilsen, *supra* note 7, at 124.
[144] United States Department of Justice Civil Rights Division, *Investigation of Alabama's State Prisons for Men*, DEP'T OF JUST. (Apr. 2, 2019), https://www.splcenter.org/sites/default/files/documents/doj_investigation_of_alabama_state_prisons_for_men.pdf.
[145] *Id.* at 2.

The investigation revealed that an excessive amount of violence, sexual abuse, and prisoner deaths occur on a regular basis within Alabama's prisons such that there is reasonable cause to believe that there is a pattern and practice of Eighth Amendment violations throughout the system.[146] The details of these excesses are gruesome. During one week of observation, one prisoner was stabbed repeatedly and left to bleed out, one was severely beaten with a sock filled with metal locks, one was set on fire in his sleep.[147] Another prisoner had been dead for so long that when he was discovered lying face down, his face was flattened. The assailants had also urinated on him and carved gang-related numbers into his ribcage.[148]

Other damning investigations exposed similarly lamentable conditions. One report by Oregon Public Broadcasting, KUOW, and the Northwest News Network found that at least 306 people died in Northwest jails since 2008; a number which was previously unknown because Oregon and Washington did not comprehensively track the deaths in the county jails.[149] At least 70 percent of those deaths were of inmates who were awaiting trial at the time of the deaths.[150] Four hundred and twenty-eight prisoners died in Florida prisons in 2017.[151] In Mississippi, 16 people died in one month.[152]

Women's prisons are plagued with the same structural deficiencies as men's prisons which leads to their categorical degradation. Incarcerated women are 30 times more likely to be

[146] *See id.*
[147] *Id.*
[148] *Id.* at 15.
[149] Conrad Wilson, Tony Schick, Austin Jenkins & Sydney Brownstone, *Booked and Buried: Northwest Jails' Mounting Death Toll*, OPB (Apr. 2, 2019), https://www.opb.org/news/article/jail-deaths-oregon-washington-data-tracking/.
[150] *Id.*
[151] Matt Ford, *The Everyday Brutality of America's Prisons*, NEW REPUBLIC (Apr. 5, 2019), https://newrepublic.com/article/153473/everyday-brutality-americas-prisons.
[152] Jon Schuppe & Teresa Frenzel, *16 Prisoners Died in One Month in Mississippi. Their Families Want to Know Why.*, NBC NEWS (Sept. 18, 2018), https://www.nbcnews.com/news/us-news/15-prisoners-died-one-month-mississippi-their-families-want-know-n905611.

raped than women who are not incarcerated. Many of these rapes are committed by staff.[153] The stories are harrowing. There are many examples of guards using their privilege and access to coerce vulnerable prisoners to submit to sexual abuse in exchange for protection that never comes.[154]

Children held at youth detention facilities face similar conditions. Sexual abuse of incarcerated children, including by staff is widespread and commonplace.[155] The Bureau of Justice Statistics released a report in 2018 revealing that over 7 percent of incarcerated children reported to being sexually abused in the previous year.[156] A class action involving men and women who were held at a New Hampshire youth detention facility alleged that they experienced physical, sexual, and emotional abuse while incarcerated at the facility.[157] The lead plaintiff said he was repeatedly raped by two men who worked as counselors at the detention center when he was incarcerated there in the late 1990s.

An increased reliance on long-term isolation, or solitary confinement, as a means of behavioral control has exacerbated the already substandard prison conditions. Though at one point the practice was regarded to be unacceptably cruel and ineffective, solitary confinement roared to prominence as a result of decades of "tough on crime" politics and the construction of supermax prisons.[158] At least 61,000 people on any given day are in solitary confinement across

[153] Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, THE NATION (Mar. 2, 2015), https://www.thenation.com/article/archive/why-americans-dont-care-about-prison-rape/.
[154] *Id.*
[155] Vaidya Gullapalli, *Sexual Abuse in Youth Detention Facilities*, THE APPEAL (Jan. 13, 2020), https://theappeal.org/sexual-abuse-in-youth-detention-facilities/.
[156] *Id.*
[157] *Id.*
[158] Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX.COM (Apr. 17, 2019), https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform.

the country, where they are forced to spend 23 hours each day in cramped cells.[159] When people are let out, it is into small, solitary outdoor cages with no recreational equipment.[160] Some go years without seeing the sky.[161] Like the rest of the criminal justice system, those subjected to this extreme treatment are disproportionately young men of color.[162] While most spend a few months in it, thousands have been in solitary confinement for six years or more; some for decades.[163] In a suit about the isolation unit of New York's Clinton State Prison at Dannemora, the Second Circuit quoted the plaintiff's description of the strip-cell in which he had been placed:

> [T]he said solitary confinement cell wherein plaintiff was placed was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue superimposed thereon; plaintiff was without clothing and entirely nude for several days [elsewhere said to be 11 days] until he was given a thin pair of underwear to put on; plaintiff was unable to keep himself clean or perform normal hygienic functions as he was denied the use of soap, towel, toilet paper, tooth brush, comb, and other hygienic implements and utensils therefore; plaintiff was compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the said hours under the pain and threat of being beaten or otherwise disciplined therefore; the

[159] Joshua Manson, *How Many People are in Solitary Confinement Today*, SOLITARY WATCH, https://solitarywatch.org/2019/01/04/how-many-people-are-in-solitary-today/ (last visited Oct. 30, 2021); *see also* Wykstra, *supra* note 158.
[160] Wykstra, *supra* note 158.
[161] Eli Hager, *My Life in the Supermax*, THE MARSHALL PROJECT (Jan. 8, 2016), https://www.themarshallproject.org/2016/01/08/my-life-in-the-supermax.
[162] Wykstra, *supra* note 158.
[163] Wykstra, *supra* note 158.

> windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing plaintiff to be exposed to the cold air and winter weather without clothing or other means of protecting himself or to escape the detrimental effects thereof; and the said solitary confinement cell was used as a means of subjecting plaintiff to oppression, excessively harsh, cruel and inhuman treatment specifically forbidden by the Eighth Amendment to the United States Constitution. [164]

The United Nations special rapporteur on torture, Juan E. Méndez, deemed the practice a form of torture.[165] Further, the UN's Mandela Rules dictate that it should never be used with youth and those with mental or physical disability or illness, or for anyone for more than 15 days.[166] Mendez's survey of the practice around the world revealed that "the United States uses solitary confinement more extensively than any other country, for longer periods, and with fewer guarantees."[167] Like other forms of torture, solitary confinement has a negative impact on people far beyond the time spent in isolation.[168] One researcher found that segregated prisoners are "utterly dysfunctional when they get out" and family members of recently released individuals often seek his assistance.[169]

Degradation and dehumanization are two unspoken purposes of punishment in the American prison system. Even without violence, the American prison experience is particularly harsh. Guards throw the handcuffed and chained prisoners' belongings into a pile and order them

[164] Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273, 281 (2020) (quoting Wright v. McMann, 387 F.2d 519, 521 (2d Cir. 1967)).
[165] *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UNITED NATIONS (Oct. 2011), https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says.
[166] Wykstra, *supra* note 158.
[167] Wykstra, *supra* note 158.
[168] Nilsen, *supra* note 7, at 129-30.
[169] Nilsen, *supra* note 7, at 130.

to clean up the mess.[170] Complaints about particular cellmates resulted in the complainant being assigned more violent cellmates.[171] For a long time, prisons were able to transfer inmates without cause or hearing, to a remote part of the state or even farther to keep them away from friends and family.[172] Prison officials may prevent a prisoner from seeing his child, or deny visitors altogether if the inmate has broken a rule.[173] Prisoners lose their worldly connections and the ability to make their own choices. They lose their identity, particularly in prisons where the corrections staff refer to them by institutionalizing terms like "prisoner," "inmate," or "tans."[174] Their ability to maintain basic hygiene is severely diminished, particularly for those who menstruate.[175]

But the dehumanization does not end when incarceration does. In the American criminal justice system, federal and state legislatures have made it such that formerly incarcerated people are always relegated to a model of second-class citizenship. To give a cursory overview of some of the vast network of barriers that formerly incarcerated individuals face, there are more than 40,000 consequences in the United States that can attach after an individual leaves prison.[176] On average, 750 consequences are imposed by state and territorial law in each jurisdiction.[177] There are an additional 950 consequences imposed by federal law that apply in every jurisdiction.[178] These consequences include: ineligibility for public and government-assisted housing, public

[170] Nilsen, *supra* note 7, at 130.
[171] Nilsen, *supra* note 7, at 130.
[172] Nilsen, *supra* note 7, at 131.
[173] Nilsen, *supra* note 7, at 131.
[174] Ruth Delaney, Ram Subramanian, Alison Shames &Nicholas Turner, *Reimagining Prison Web Report,* VERA INSTITUTE (Sept. 2018), https://www.vera.org/reimagining-prison-web-report/human-dignity-as-the-guiding-principle [hereinafter *Prison Web Report*].
[175] *Id.*
[176] *After the Sentence, More Consequences: A National Snapshot of Barriers to Work*, COUNCIL OF ST. GOVERNMENTS JUST. CTR, at 2 (Jan. 2021), https://csgjusticecenter.org/publications/after-the-sentence-more-consequences/national-snapshot/ [hereinafter "*Consequences*"].
[177] *Id*.
[178] *Id*.

benefits, and various forms of employment.[179] Collateral consequences restrict access to occupational licenses needed to work in certain fields and business licenses needed to pursue self-employment.[180] They make some ineligible for some educational loan or grant benefits and driver's licenses.[181] Many states do not allow formerly incarcerated people to vote. More than 80 percent of these consequences attach indefinitely.[182] These consequences have the biggest impact on minorities.[183]

If abolition permits the sacrifice of those presently suffering in exchange for the success of a particular agenda, the sanctity of the movement is negated. Expediency is crucial; the millions subjected to the unimaginable cruelty of the system cannot wait for a legislative miracle. And even if that legislative miracle were to take place, it would take months, years even, to disentangle the vast network of prisons and jails from the criminal justice system; even longer to unlearn the ways of thinking that led to it. As Marie Gottschalk explained in her book *Caught: The Prison State and the Lockdown of American Politics,* the American carceral system is more impervious to change than most people imagine.[184] Therefore, the two forces of long-term visions and near-term efforts must work in tandem for the best chance at alleviating at least some of the suffering taking place in America's prisons.

III. What Dignity Requires Immediately

All conceptions of the principle of human dignity mandate criminal justice reform in the United States. No matter the formulation of its requirements, its tenets, or the skepticism of the

[179] Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (May 2010).
[180] *Consequences*, *supra* note 176, at 2.
[181] Nilsen, *supra* note 7, at 137.
[182] *Consequences*, *supra* note 176 at 4.
[183] Nilsen, *supra* note 7, at 135.
[184] Allegra McLeod, *Review Essay: Beyond the Carceral State, Caught: The Prison State and the Lockdown of American Politics*, 95 TEX. L. REV. 651 (2017).

term's usefulness to human rights discourse, human beings have an innate understanding of what dignity is not. This is what has helped to guide the term to the center of modern human rights discourse and what has allowed it to provide an internationally accepted framework for the normative regulation of political life.[185] The violation of an individual's dignity triggers such a visceral response in most that it feels almost evolutionary; as if humanity has evolved to recognize, and want to avoid, certain types of treatment even if that treatment is not life threatening. Here, the discussion that pervades philosophical discourse on the topic of human dignity, mainly its meaning and affirmative grants, is not dispositive in order to determine what dignity requires, though it is relevant. The nuances of that conversation, and the virtues it implicates (autonomy, responsibility, rationality, liberty, etc.), have no bearing on whether human beings should have to suffer prison rapes, for example: even if dignity is a redundant term for autonomy as many scholars, like Ruth Macklin, suggest.[186] This paper seeks to illuminate abundantly clear violations of dignity in order to advocate for reform that restores basic humanity to the criminal justice system. The suggested reforms will be outlined in this section and addressed by each component part of the criminal justice system discussed above: law enforcement, the courts, and the correctional system. Some attention will be given to post-release factors, which relegate the formerly incarcerated to a second-tier caste. However, because that reform would rely on federal and state government action, it is not the kind of immediate action advocated for by this paper.

a. Law Enforcement

Calls to reform policing, or abolish it altogether, have never been as loud and seemingly unanimous as they were in the wake of the public execution of George Floyd in the summer of

[185] MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 1 (2012).
[186] *Id.* at 5.

2020. Polls suggest that about 15 million to 26 million people in the United States participated in demonstrations in the early weeks of June.[187] In some places, the public outcry led to political action. Cities across the county cut funding to police departments. For example, the Los Angeles Budget Committee approved reallocating $133 million from the LAPD budget to other areas; a direct response to the rallying cry "defund the police" which echoed through city streets throughout most of last year.[188] Thirty-one of the country's 100 largest cities passed policies restricting the use of chokeholds by law enforcement.[189] Breonna's Law was passed in Louisville, Kentucky banning the kind of "no-knock" warrant that led to Breonna Taylor's murder.[190] Cities began enacting and strengthening "duty-to-intervene" policies, which require officers to step in when their colleagues use excessive force.[191]

While these reforms are necessary, there is still a significant amount of work to be done to further inject dignity into the relationship between law enforcement and the people they are meant to protect. Though there are significant barriers to sweeping change, namely police unions, Michael German's suggestions regarding what is necessary to tackle white supremacy in policing does not implicate the kind of bureaucratic overall that many seeking police reform demand. German suggests that all law enforcement agencies do the following: recruit more people of color, establish clear policies regarding participation in white supremacist organizations and other far-right groups, and on overt and explicit expressions of racism with specificity, regarding tattoos, patches, and insignia, as well as social media posting; establish

[187] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.
[188] Jackie Menjivar, *Black Lives Matter Protests: What's Been Achieved So Far*, DoSomething.Org (Aug. 13, 2020), https://www.dosomething.org/us/articles/black-lives-matter-protests-whats-been-achieved-so-far.
[189] *Id.*
[190] *Id.*
[191] *Id.*

mitigation plans when biased officers are detected; create reporting mechanisms to ensure evidence of overtly racist behavior by a police officer is provided to prosecutors; encourage whistleblowing and protect whistleblowers.[192] German further suggests that the federal government establish a public hotline for reporting racist activity by law enforcement officials, strengthen whistleblower protections for federal law enforcement agents, and create a national database of police misconduct records.[193] Dozens of advocates argue for better, more consistent, de-escalation training or training that encourages future law enforcement to show empathy and "leave everyone they encounter 'with their dignity still intact.'"[194]

Certainly, more comprehensive changes must be made to successfully alter the relationship that police have with their communities. Many of those efforts, *e.g.*, amending 18 U.S.C. § 242, will take more time than black communities have to give and therefore must be worked on in the background while more readily solvable issues press on in the fore.

b. The Courts

Changing any facet of the court system tends to require legislative or executive action, making expediency difficult to achieve due to the current political climate. For example, appointing more diverse judges to the federal bench requires a progressive political appetite from both the president and the Senate; something the United States has not possessed for several years. Further, without legislative or presidential intervention, the ideological make-up of the current Supreme Court will likely be a hinderance for the advancement of dignity in Eighth Amendment jurisprudence. Additionally, much of what makes interactions with judges or their

[192] German, *supra* note 40.
[193] German, *supra* note 40.
[194] Rosa Brooks, *Stop Training Police Like They're Joining the Military*, THE ATLANTIC (June 10, 2020), https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859/; *see also* Alana Semuels, *Society is Paying the Price for America's Outdated Police Training Methods*, TIME (Nov. 20, 2020), https://time.com/5901726/police-training-academies/.

court rooms so undignified is mandated by discretion-limiting statutes or predetermined by other actors in the system like prosecutors or law enforcement.

Prosecutorial reform is one area where there is room for expediency, particularly federal prosecutors, who must abide by guidance provided by the U.S. Attorney General. Today, reforming the behavior of federal prosecutors could be achieved through a charging and sentencing memorandum; one that seeks to further dignity into prosecutorial decision-making, akin to Eric Holder's memo, issued in May 2010.[195]

Many advocates have highlighted the metrics of success as one of the ways to reform the position.[196] If success means acquiring a certain number of convictions, longer sentence lengths, or lower crime rates, then prosecutors would shape their behavior in a way to achieve those ends. If prosecutors were focused on metrics that actually reflect the health and well-being of the community, they would be forced to make different decisions. In 2017, researchers from Florida International University and Loyola University of Chicago deployed a tool known as Prosecutorial Performance Indicators which seeks to collect data in order to redefine what success in prosecution looks like. This tool is a dashboard of 55 indicators each assessing prosecutorial progress on a monthly or quarterly basis toward achieving three broad goals: capacity and efficiency, community safety and well-being, and fairness and justice.[197] In practice, this tool helps prosecutors understand trends and identify red flags in order to implement equitable solutions for their communities. More prosecutor's offices around the country should deploy this tool.

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[195] Attorney General Eric J. Holder Jr., *Department Policy on Charging and Sentencing*, DEP'T OF JUST. (May 19, 2010), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf.
[196] Melba Pearson, *The Data That Can Make Prosecutors Engines of Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Nov. 23, 2020), https://www.brennancenter.org/our-work/analysis-opinion/data-can-make-prosecutors-engines-criminal-justice-reform.
[197] *Id.*

Since prosecutors have nearly unfettered discretion, they have the ability to acknowledge their own fallibility and shape policies in a way that takes dignity into consideration. The Institute for Innovation in Prosecution at John Jay College ("IIP") put together a report outlining a series of changes prosecutors' offices should make in order to assess and improve their internal culture.[198] Some of their suggestions include: increasing staff exposure to communities most affected by the criminal legal system; normalizing the notion that prosecutors are fallible; requiring participation in policy research and policymaking from junior and senior attorneys; hiring from the community; and regularly communicating office goals, policy positions, and successful uses of non-incarceratory dispositions through the head prosecutor.[199] These reforms are meant to guide prosecutors out of an era of relying on "outdated notions for achieving public safety" and away from a "culture that rewards achieving convictions."[200]

If the changes to other arms of the criminal justice regime are made with expediency, dignity may just trickle into our courtrooms. This is not to say that court reform is a lost cause, but rather to highlight that this arm of the criminal justice system mandates investment in long-term visions if substantive change is to take place. Revolutionary thinking will be necessary.

c. The Correctional System

A report published by the Vera Institute outlined several ways the correctional system could be reformed with human dignity as an organizing principle. The report proclaims that "[h]uman dignity is a rejoinder to the persistent dehumanization that characterizes current and historic incarceration."[201] The drafters of this report assume that any consideration of the principle of

[198] Ethan Lowens, Rena Paul & Jonathan Terry, *Prosecutorial Culture Change: A Primer*, INST. FOR INNOVATION IN PROSECUTION (2020), https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5feb710347ceb21aac5ca43f/1609265420240/IIP+Prosecutorial+Culture+Change+FINAL.pdf.
[199] *Id.* at 3.
[200] *Id.* at 1.
[201] *Prison Web Report*, *supra* note 175.

dignity would affect all aspects of imprisonment, from its purpose to the experience of everyday life in confinement.[202] This paper argues that the criminal justice system more broadly would be significantly altered if dignity was considered. As the Vera Institute report states, "[w]here we have denied humanity, we must embrace human dignity."[203]

The Vera Institute report is divided into three principles intended to help elucidate what a dignity-centered approach to prisons may mean in practice: (1) respect the intrinsic worth of each human being; (2) elevate and support personal relationships; and (3) respect a person's capacity to grow and change.[204]

Some suggestions under the first enumerated principle are as follows: requiring corrections staff to call incarcerated people by their names; permitting incarcerated people to make individual choices about their attire or offering variety in institutionally assigned clothing; prohibiting uniforms intended to degrade, such as pink boxer shorts or tight, white, transparent uniforms.[205] Further, the report argues that prisons should provide an adequate supply and variety of hygienic products that are of normal quality; supply incarcerated people who menstruate with adequate supply and choice of sanitary products; serving an adequate quantity of edible and healthy food; encouraging corrections staff and incarcerated people to view each other as humans worth getting to know beyond the guard-inmate paradigm.[206]

Reforms targeting the elevation of personal relationships are as follows: allowing a generous number of visits for reasonable durations of time; permitting physical contact between partners or parents and their children; creating policies that ensure all visitors are treated respectfully and

[202] *Prison Web Report*, *supra* note 175.
[203] *Prison Web Report*, *supra* note 175.
[204] *Prison Web Report*, *supra* note 175.
[205] *Prison Web Report*, *supra* note 175.
[206] *Prison Web Report*, *supra* note 175.

fairly; making phone calls, emails, and video calls available to incarcerated people at reasonable rates.[207]

Reforms targeting the third principle are as follows: supplying up-to-date reading material, including newspapers, textbooks, legal information, and recreational nonfiction and fiction books; allowing incarcerated people to form clubs or affinity groups to share hobbies and discuss issues or interest; engaging incarcerated people in the creation and enforcement of in-unit rules.

Many of the additional reforms suggested by the Vera Institute would require massive bureaucratic overalls—e.g., implementing compassionate release programs, developing fair and transparent internal grievance and complaint processes; allowing incarcerated people to exercise their right to vote[208]—and are thus, not the type of reform advocated for in this paper but are crucial to the protection of human dignity all the same.

The small incremental changes advocated for above will not be able to account for every failure in the system. In fact, it is not likely that any set of reforms would be able to solve all that ails the broken American system. Prisons, and the entire criminal justice system more broadly, are a cornerstone of our society.[209] As a result, true substantive change can only come once the electorate relearns its relationship with punishment and votes with that understanding in mind.

d. Collateral Consequences

Some attention must also be given to the unending web of collateral consequences that tangle the formerly incarcerated in perpetuity, if only to acknowledge that this too is the type of reform that would be mired in the bowels of American bureaucracy for an unacceptable amount of time.

[207] *Prison Web Report*, *supra* note 175.
[208] *Prison Web Report*, *supra* note 175.
[209] Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Criminal Law: Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 353 (2021).

Nonetheless, the United States should reshape its collateral consequences in a manner that best positions them to become productive contributors to their families and communities.[210]

Professor Michael Pinard suggests that the U.S. should aim to implement measures that enhance the dignity interests of individuals with criminal records by removing unnecessary legal impediments to reentry and ultimately promoting their standing in the community.[211] Further, the United States should tailor any collateral consequences to the underlying offense by imposing only those consequences that directly relate to the underlying criminal conduct and are therefore necessary to minimize the risk of additional harm.[212]

Additionally, Professor Pinard suggests that jurisdictions implement mechanisms, like those suggested by the American Bar Association (ABA), to alleviate the legal penalties that accompany a criminal record.[213] The ABA's proposal organizes collateral consequences into categories and suggests new infrastructure to help individuals relieve themselves of the consequences.[214] Professor Pinard also suggests that the U.S. analyze the racially disproportionate impact of collateral consequences by implementing measures similar to those adopted in Canada, which are discussed later, and by requiring racial and ethnic impact statements for any newly proposed expansions of federal or state collateral consequences.[215]

IV. International Comparisons

[210] Pinard, *supra* note 179, at 525.
[211] Pinard, *supra* note 179, at 525.
[212] Pinard, *supra* note 179, at 528.
[213] Pinard, *supra* note 179, at 530.
[214] Pinard, *supra* note 179, at 530.
[215] Pinard, *supra* note 179, at 532-33.

In other Western Democracies, dignity plays a more significant role in the shaping of their criminal justice system and its impact is reflected in the length of their sentences, the conditions of their prisons, and their consciousness of racial biases.

In his book Harsh Justice: Criminal Punishment and the Widening Divide between America and England, legal historian James Whitman argued that the source of this cultural difference can be attributed to America's understanding of status as compared to Europe's.[216] To summarize, Whitman posits that the contours of punishment in society follow the hierarchal ordering of that society (e.g., the lowest rank in Europe would be hanged, while nobility was beheaded).[217] Since America lacked a formal caste, it did not develop an ordering of punishments, enabling a sort of generalized culture of cruelty regardless of status.[218] Professor Trevon Rosson's note on Whitman's thesis explained: "[w]here aristocratic traditions in France and Germany encouraged the generalization of dignified and benevolent punishment, the absence of those traditions in America" inhibited the its ability to envision a less degrading system of punishment.[219]

Whitman also identified the insidious nature of "vox populi" in democratic politics as a source of harshness in the U.S. criminal justice system.[220] In America there is a "populist and demagogic tradition" that encourages politicians to be tough on crime and to punish aggressively.[221] "A politician in America who is soft on crime is a politician without a job."[222] In comparison, countries like Germany and France have insulated the process of punishment from the world of politics by building strong bureaucracies that regulate the punishment policies.[223]

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[216] Trevon Rosson*, Book Note: Harsh Justice: Criminal Punishment and the Widening Divide between America and England by James Whitman*, 31 AM. J. CRIM. L. 317, 321 (2004).
[217] *Id*.
[218] *Id*.
[219] *Id*.
[220] *Id.* at 333.
[221] *Id*.
[222] *Id*.
[223] *Id.* at 332.

To Whitman, recognition that the origin of America's marked cruelty stretches beyond the purposes of punishment may help remove obstacles in ideological discussion and clear the pathways of reform.[224] Though imperfect, drawing inspiration from other democracies should persuade legislators in our own government to implement certain policies. This section will briefly review differences in policies in Germany, France, Canada, and South Africa.

Germany

In Germany, where human dignity is enshrined in its constitution, imprisonment is a last resort.[225] Article I of Germany's Basic Law declares that "the dignity of man is inviolable" and imposes a duty on state authority to respect and protect it.[226] Further, Germany has incorporated crucial human rights documents that refer to dignity as a foundational principle, e.g., the Universal Declaration of Human Rights (UNDHR) and the International Covenant on Civil and Political Rights (ICCPR), into its national constitution and national laws and continue to reinforce the proclamations contained therein as new generations of human rights instruments are drafted.[227] As a result, prison sentences are short and life in prison approximates life on the outside as much as possible.[228] Prisons offer real jobs to inmates, with pay and vacation.[229] They are often not required to wear uniforms and are addressed respectfully by correctional staff. [230] Privacy is protected; there are no bars on the doors.[231] And though the description is perhaps aspirational, as noted by Professor James Whitman in his study of French and German practices,

[224] *See generally id.*
[225] Nilsen, *supra* note 7, at 161.
[226] Nilsen, *supra* note 7, at fn. 25.
[227] *Doing the Right Thing,* supra note 26, at 9.
[228] Nilsen, *supra* note 7, at 161.
[229] Nilsen, *supra* note 7, at 161.
[230] Nilsen, *supra* note 7, at 161.
[231] Nilsen, *supra* note 7, at 161.

the German code reveals its overall intent. "The lives of convicts are supposed to be, as far as possible, no different from the lives of ordinary German people."[232]

France

Mapping the French system onto the American system would be difficult to achieve, though some scholars argue that the "legal cultural gap between the French and American systems is not as great as some comparative researchers have supposed."[233] However, one technique that might prove useful and easily implemented is the way in which police, prosecutors, and judges are selected, trained, and supervised.

Whereas institutions in the United States are structured to be supervised by local groups, French institutions are subject to nationwide standards.[234] While a national police hierarchy would not be workable in the U.S. federal system, a set of national police standards addressing model training programs and supervision styles, with a database on misconduct is certainly feasible. Professor Richard Frase suggests that reformers of the American system also seriously consider the adoption of legislation requiring supervisory-level approval for certain critical police actions like undercover operations, warrantless, non-exigent arrests in public places; line-ups and other identification procedures not subject to the right-to-counsel safeguards; and prolonged custodial interrogation.[235]

Additionally, French prosecutors are subject to a more rigorous and centralized training program which may better prepare them for their role. The normal path of entry into the profession in France into either branch of the magistrate (judges and prosecutors) is through a

[232] Nilsen, *supra* note 7, at 162 (quoting JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 8 (2003)).
[233] Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It?*, 78 CALIF. L. REV. 542, 552 (1990).
[234] *Id.* at 553.
[235] *Id.* at 557.

24-month training program which guide them through the system, exposing them to a bird's eye view of the mechanisms operating the system before expecting them to perform.[236]

Canada

One of the most consequential ways the Canadian criminal justice system differs from the system in the United States is in its emphasis on proportionality review. Scholars argue as to whether the principle of proportionality exists in the U.S. Constitution, in Canada, however, the principle is explicitly adopted as a part of its constitution, the Charter of Rights and Freedoms.[237] The provision states that the rights guaranteed in the constitution are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[238] This review functions as an additional check to governmental overreach.

In practice, proportionality review is a balancing test between government authority to act and a generous understanding of the rights guaranteed by the Canadian constitution. For example, in *R. v. Smith*, the Canadian Court held a mandatory minimum of seven years for all offenses involving the distribution of narcotics to be grossly disproportionate because it applied regardless of distinctions in degrees of seriousness in the offense.[239]

In structured proportionality review, the relative importance of rights and values at stake can be distinctly evaluated and the test has proven to be a stable framework across various controversial issues.[240] In the United States, when proportionality review is present, the Supreme Court treats it as if it were a discrete and disconnected theory every time it is employed.[241]

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[236] *Id.* at 562.
[237] Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3110 (2015).
[238] Canadian Charter of Rights and Freedoms § 1, part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).
[239] *Id.* at 3186.
[240] *Id.* at 3119.
[241] *Id.* at 3121.

Injecting structured proportionality review more forcefully into American jurisprudence may bring U.S. constitutional law closer to U.S. conceptions of justice.[242]

Canada has also gone beyond mere recognition of the historic and contemporary discrimination against Aborigines in its criminal justice system and implemented concrete steps to lessen racial disparities in incarceration.[243] In 1996, Canada codified a statute providing for the conditional sentence of imprisonment with "the express goal of reducing the use of incarceration as a sanction" in response to its disproportionate incarceration of Aborigines.[244] This statute provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances," and requires judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances."[245] Further, it mandates that judges pay "particular attention to the circumstances of aboriginal offenders."[246] The Supreme Court of Canada interpreted this statute in *Regina v. Gladue*, finding that it is remedial because it directs "sentencing judges to undertake the process of sentencing aboriginal offenders differently in order to endeavor to achieve a truly fit and proper sentence in the particular case."[247]

South Africa

Though South Africans with criminal records face collateral consequences comparable to those in the United States, like prohibitions in certain fields of employment, they do enjoy certain constitutional rights that the formerly incarcerated in the United States do not.[248] Dignity is a foundational principle in the South African Constitution. The Bill of Rights requires that all

[242] *Id.* at 3194.
[243] Pinard, *supra* note 179, at 464.
[244] Pinard, supra note 179, at 517.
[245] Pinard, *supra* note 179, at 517.
[246] Pinard, *supra* note 179, at 518.
[247] [2002] 3 S.C.R. 519, 523 (Can.).
[248] Pinard, *supra* note 179, at 499.

individuals be treated with "inherent dignity" which has been invoked in various contexts.[249] In the criminal justice context, this dedication to dignity has materialized to protect voting rights of those with criminal records. For instance, in Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), the Constitutional Court declared unconstitutional a law that disenfranchised those sentenced to prison with the option of paying a fine instead of imprisonment due to the role that the right to vote has played in entrenching white supremacy.[250]

South Africa, like Canada, has also taken steps to thwart the lingering impact racial subjugation has had on its citizens by declaring it both relevant and central to determining certain legal claims.[251] For example, in his concurrence in Brink v Kitshoff NO, Justice O-Regan of the Constitutional Court states that the Equality Clause of South Africa's Constitution "needs to be interpreted" in light of apartheid's "systematic discrimination against black people in all aspects of social life" and "the enduring legacy that it bequeathed."[252] Though the Supreme Court of the United States has recognized the nation's history of racial apartheid, it frequently fails to acknowledge the role it plays in society currently.[253]

V. Conclusion

Respect for dignity requires immediate action on behalf of all who currently interact with the criminal justice system in America. Though many more meaningful efforts, such as legislation or court reform, mandate the kind of comprehensive overhaul that many scholars advocate for,

[249] Pinard, *supra* note 179, at 499.
[250] 2005 (3) SA 280 (CC) (S. Afr.).
[251] Pinard, *supra* note 179, at 518.
[252] Pinard, *supra* note 179, at 517 (quoting 1996 (4) SA 197 (CC) at 217 (S. Afr.) (O'Regan, J. concurring)).
[253] *See* Shelby County v. Holder, 570 U.S. 529 (2013) (invalidating Section 4(b) of the Voting Rights Act of 1965 because it was based on a formula using 40-year-old facts that were not related to the present day).

small changes that can be immediately implemented will help reaffirm the humanity of those presently in the system. Any other style of reform does not take seriously their plight.

It is imperative that the mission to rectify the indignities of the system does not sacrifice those beholden to its violations today. Perfect recognition of human dignity is not defined, therefore perfection in reform is not attainable. Most can recognize certain behaviors as blatantly disrespectful to our shared humanity. We have an obligation to alleviate the suffering of those being violated. Modest reform efforts must demand our immediate attention.

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March 27, 2023

The Honorable Jamar K. Walker
U.S. District Court
Eastern District of Virginia
600 Granby St.
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Dear Judge Walker,

I am a student at the New York University School of Law and write to apply for a clerkship in your chambers during the 2024-25 term or any subsequent term. Following graduation, I will be an associate at Skadden, Arps, Slate, Meagher & Flom in New York.

Please find my resume, writing sample, and transcript attached. My writing sample is a memorandum that I prepared as part of my work in the Civil Rights Clinic. My application also includes letters of recommendation from Professors Daniel Francis, Cynthia Estlund, and Deborah Archer. I took Professor Francis's antitrust course in fall 2022. I took Professor Estlund's property course in fall 2022 and her seminar, *Regulating Work Beyond Employment*, in spring 2021. In the seminar I authored a paper exploring extending the statutory labor exemption to federal antitrust laws to include coordination among non-employee gig workers. Professor Archer supervised my work in the Civil Rights Clinic from fall 2021to fall 2022.

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Through my work in the Civil Rights Clinic, at Skadden, and at the legal nonprofits Centro de los Derechos del Migrante and Her Justice, I have gained substantial exposure to a range of processes relevant to litigation. I am deeply enthusiastic about the prospect of clerking for you. I would be delighted to answer any questions you may have about my application. Thank you for your consideration.

Respectfully,

/s/
Lily Fagin

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Law Students for Economic Justice, Board Member, April 2021 – April 2022
Research Assistant to Professor Helen Hershkoff, Civil Procedure, Summer 2021

DARTMOUTH COLLEGE, Hanover, NH
B.A. in History, *cum laude*, June 2016
Honors: James O. Freedman Presidential Scholar – *selected for paid research assistantship*
Activities: Student and Presidential Committee on Sexual Assault, Policy Chair
Outing Club, First-Year Trips Student Leader
Study Abroad: Universitat de Barcelona, Spanish Language Study Abroad Program, Spain, winter 2014

EXPERIENCE

SKADDEN ARPS SLATE MEAGER & FLOM, New York, NY
Associate, beginning September 2023; *Summer Associate,* May 2022 – July 2022
Researched issues and wrote memoranda related to ongoing securities, antitrust, and mass tort litigation, as well as pro bono initiatives. Assisted with deposition preparation. Returning to join the mass torts practice group.

CIVIL RIGHTS CLINIC, New York, NY
Student Advocate, September 2021 – December 2023
Initiate nationwide impact litigation and policy projects related to racial and reproductive justice. Clinic was awarded the NAACP foot soldier award for litigation and advocacy. Represented employment discrimination plaintiff in a mediation before the New York City Commission on Human Rights.

CENTRO DE LOS DERECHOS DEL MIGRANTE, Mexico City
Summer Law Clerk, June 2021 – August 2021
Researched issues and wrote memoranda related to ongoing litigation on behalf of migrant workers in the United States. Conducted bilingual intakes and investigative interviews with workers to assess potential legal violations. Researched available remedies and assisted workers in preparing complaints to administrative agencies.

HER JUSTICE, New York, NY
Legal Assistant, April 2019 – June 2020
Provided wide range of legal and administrative support in the areas of family, divorce, and immigration law. Conducted bilingual intakes and advised clients on legal processes and available resources.

SUCCESS ACADEMY CHARTER SCHOOLS, Brooklyn, NY
Humanities Lead Teacher, July 2016 – June 2018
Taught History and English to students from traditionally underserved neighborhoods.

SOUTHWEST CENTER FOR LAW AND POLICY, Tucson, AZ
Dartmouth Partners in Community Service Fellow, June 2015 – September 2015
Designed programs, wrote policy briefs, and drafted protocol related to sexual assault in Indian Country. .

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Torts	LAW-LW 11275	4.0	B
Instructor: Eleanor M Fox			
Procedure	LAW-LW 11650	5.0	B
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	IP
Topic: Tax, Race, and Class			
Instructor: Daniel N Shaviro			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

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Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Avani Mehta Sood			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Daniel N Shaviro			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer, Johanna E Miller			
Civil Rights Clinic	LAW-LW 10627	3.0	A-
Instructor: Deborah Archer, Johanna E Miller			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2021 Research Assistant			
Instructor: Helen Hershkoff			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff, Arthur R Miller			
Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer, Johanna E Miller			
Civil Rights Clinic	LAW-LW 10627	3.0	A-
Instructor: Deborah Archer, Johanna E Miller			
Regulating Work Beyond Employment Seminar	LAW-LW 12513	2.0	A
Instructor: Cynthia L Estlund, Mark D. Schneider			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2022

School of Law
Juris Doctor
Major: Law

Antitrust Law	LAW-LW 11164	4.0	A
Instructor: Daniel S Francis			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Daniel J Capra			
Property	LAW-LW 11783	4.0	A
Instructor: Cynthia L Estlund			
Advanced Civil Rights Clinic	LAW-LW 12805	2.0	A
Instructor: Joseph Schottenfeld			
Advanced Civil Rights Clinic Seminar	LAW-LW 12806	1.0	A
Instructor: Joseph Schottenfeld			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	70.0	70.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post Conviction	LAW-LW 10104	4.0	A-
Instructor: Emma M Kaufman			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Joseph E Neuhaus			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Maggie Blackhawk			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A
Instructor: Helen Hershkoff			
Review of Law & Social Change	LAW-LW 11928	2.0	CR

	AHRS	EHRS
Current	14.0	14.0
Cumulative	84.0	84.0

Staff Editor - Review of Law & Social Change 2021-2022
Executive Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021